

LA CERTITUDE MORALE DANS LE *PROCESSUS BREVIOR*: NOUVELLE DYNAMIQUE OU CONSTANCE DE LA DOCTRINE CANONIQUE ?

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RÉSUMÉ — La nouvelle dynamique du *processus brevior* dans l'ordonnancement canonique suscite de nombreuses interrogations qui, loin de constituer des remises en question de la *Mitis Iudex*, se révèlent être un passage nécessaire à sa compréhension en vue de sa bonne réception dans les pratiques judiciaires. La question de la certitude morale en tant qu'élément central de l'activité délibérative au for canonique n'est pas subsidiaire, surtout lorsqu'on sait qu'aujourd'hui, nombreux sont les couples chrétiens en phase de recomposition à penser que le critère de la miséricorde devrait atténuer toute capacité à un jugement objectif. Pourtant la constance de la doctrine reste la même: l'obligation de la certitude morale dans l'évaluation des mariages canoniques lors du *processus brevior* se loge à la même enseigne que celle prévalant dans les jugements par voie du contentieux ordinaire. La dimension miséricordieuse de l'Église envers ses fils n'annihile pas ses capacités à demeurer dans la vérité objective.

SUMMARY — The new dynamics of the *processus brevior* in the canonical ordinance triggered many questions that, far from calling into question *Mitis Iudex*, have proven to be a necessary path to its understanding for a good reception of the law in judicial practice. The question of moral certitude as a central element of deliberative activity in the canonical forum is not a subsidiary one, especially when we consider that, today, many Christian couples going through step-parenting believe that the criteria of mercy should soften the capacity for an objective judgment. Yet, the stability of the doctrine remains the same: the obligation of moral certitude in the evaluation of canonical marriages in the *processus brevior* is the same as the one required in ordinary contentious judgments. The merciful dimension of the Church for its children does not annihilate its capacity to remain in objective truth.

Introduction

Selon l'*iter* des procès canoniques, une fois achevée la discussion d'une cause traitée par voie judiciaire, le pas initial vers la formation matérielle de la sentence se configure lors de la délibération qui a lieu au cours de la *sessio pro sententia ferenda* (c. 1609, *CIC*; art. 248 §1, *DC*). Pour les juges, il s'agit d'un acte à la fois individuel et collégial. La première dimension se justifie du seul fait que la définition d'une cause est une activité de l'intelligence, engageant la conscience personnelle et le libre arbitre face aux preuves recueillies. La seconde répond au besoin de l'objectivité des positions, fondée sur l'unanimité des *vota* écrits pouvant cependant être remise en cause par une opinion contraire¹. Si ce dernier cas n'est requis que lorsque la cause est traitée par un tribunal collégial, en lieu et place d'un juge unique (comme il en est bien souvent question dans les tribunaux ecclésiastiques à l'intérieur desquels il s'observe le manque d'opérateurs de justice), il faut remarquer avec insistance que l'acuité de l'activité délibérative est intrinsèquement personnelle.

Dans le livre VII du *CIC*, il existe une distinction entre les termes “jugement” et “sentence”. Tandis que l'un traite de la décision conclusive définissant une cause judiciaire, l'autre l'expose par écrit². La délibération judiciaire intègre fondamentalement le processus de formation de la sentence canonique étant une démarche nécessaire à sa structuration. Techniquement, elle correspond à sa genèse³ car à ce niveau déjà, les juges élaborent un acte “informe”⁴, auquel la sentence écrite donne un aspect formel.

L'objectif de cette contribution est le rappel de l'obligation de la certitude morale au cœur de la délibération judiciaire dans les causes matrimoniales, indépendamment des formes processuelles employées, devant le risque des abus que pourrait engendrer aujourd'hui l'usage excessif du *processus brevior* dans certains diocèses, tout en nous proposant d'apporter un éclairage sur la question de sa véritable nature face aux éventuelles interrogations

¹ Cf. C. DE DIEGO-LORA, “Commentaire du can. 1610”, dans *CDCA3*, Montréal, Wilson et Lafleur, 2007, 1422.

² Cf. J. GARCÍA FAÍLDE, *Tratado de Derecho Procesal Canónico, Commentario al Código de Derecho Canónico vigente y a la instrucción Dignitas Connubii*, Salamanca, Publicaciones Universidad Pontificia de Salamanca, 2005, 335.

³ Cf. J. LLOBELL, “La genesi della sentenza canonica”, dans P. A. BONNET et C. GULLO (eds.), *Il processo matrimoniale canonico* (Studi Giuridici 29), Città del Vaticano, LEV, 1994, 695-735.

⁴ Cf. M. LEGA et V. BARTOCETTI (eds.), *Commentarius in iudicia ecclesiastica iuxta Codicem Iuris Canonici*, vol. 2, Romae, Anonima Libreria Cattolica Italiana, 1950, n. 2027.

pouvant émaner du m.p. *Mitis Iudex Dominus Iesus*⁵ (=MIDI) au lendemain de son entrée en vigueur dans l'ordonnancement canonique. Certes, la certitude morale ne constitue pas une fin dans la dynamique du jugement d'une cause matrimoniale, parce qu'en tout point de vue, il s'agit de la *favor veritatis*. Cependant, il reste vrai qu'elle demeure le socle sur lequel repose le bon déroulement du devoir de justice, qui dans le cadre des procès matrimoniaux canoniques ne se réduit pas de manière unilatérale aux décisions *pro nullitate*, sous le prétexte d'une sensibilité pastorale aigüe en faveur des âmes en difficultés. La règle d'or demeure le jugement moralement certain soit *pro vinculo*, soit *pro nullitate*.

Ce thème nous oblige donc à un rappel à toutes fins utiles de la doctrine canonique au sujet de la certitude morale, avant de percevoir les allures qu'elle revêt dans le *processus brevior*. C'est pourquoi notre approche s'organisera autour de six points, en partant de l'histoire de la certitude morale, de son sens et de sa signification dans les procès canoniques, de sa singularité devant les autres types de certitude possible, de son caractère objectif. Il sera aussi question de rappeler quelques fondamentaux sur la formation de la certitude morale dans les procès matrimoniaux en général, pour enfin insister sur la vision et le caractère obligatoire qu'elle revêt dans le *processus brevior*.

1 — *L'histoire du concept*

Selon les dispositions de l'article 247, *DC*, la certitude morale est une étape fondamentale dans les procédures présidant à la délibération des causes de nullité matrimoniale devant le for canonique. Ce principe, encore au centre des réflexions aussi bien doctrinales que processuelles⁶, est un préalable

⁵ Cf. FRANÇOIS, *Motu proprio Mitis Iudex Dominus Iesus*, 8 septembre 2015, dans *OR*, 155, 204 (2015), 4-5. Ce *motu proprio* a remplacé les cann. 1671-1691, du *CIC* 1983, sur les procès spéciaux en déclaration de nullité du mariage, par 29 canons auxquels ont été ajoutés 21 articles relatifs à la *ratio procedendi*.

⁶ Cf. O. GIACCHI, "La certezza morale nella pronuncia del giudice ecclesiastico", dans U. NAVARRETE (ed.), *Ius Populi Dei*, vol. 2, Roma, Università Gregoriana Editrice, 1972, 605-620; P. FELICI, "Formalità giuridiche e valutazione delle prove nel processo canonico", dans *Comm*, 9 (1977), 176-177; Z. GROCHOLEWSKI, "La certezza morale come chiave di lettura delle norme processuali", dans *IE*, 9 (1997), 417-450; P. ERDÖ, "La certezza morale nella pronuncia del giudice; problemi attuali", dans *Periodica*, 87 (1998), 81-104; J. LLOBELL, "La certezza morale nel processo canonico matrimoniale", dans *DE*, 109, 1 (1998), 758-802; A. STANKIEWICZ, "La certezza morale e la motivazione della sentenza", dans H. FRANCESCHI et al. (eds.), *La nullità del matrimonio: Temi processuali e sostantivi in occasione della Dignitas Connubii*, Roma, Edizione dell'Università della Santa Croce,

indispensable dans la définition de toutes les causes portées devant un tribunal ecclésiastique, qu'elles soient de nature contentieuse, pénale ou même contentieuse-administrative. Requête au niveau personnel dans l'esprit du juge lors de la délibération, en substance, elle est cette conviction intrinsèque qui incite à décider de manière concordante, en ayant pour seul repère l'analyse des actes et des preuves versés à l'instruction d'une cause donnée (c. 1608)⁷.

A l'origine, le concept de "certitude" dans l'appréciation d'une réalité nous provient de la scolastique primitive⁸. Il indiquait au niveau subjectif, un état d'âme exprimant le manque de doute; et au niveau objectif, une connaissance sûre en rapport avec le contenu ontologique d'une chose. Pour Saint Thomas D'Aquin, ce concept se référait à « un ferme assentiment de l'intelligence à la vérité qui exclut toute probabilité d'erreur »⁹. Dans la scolastique tardive, la "certitude morale", en tant que concept juridique apparaît avec Suarez au sujet de ses allégations contre les lois injustes, dont il prescrivait de ne pas suivre les ordonnances du fait de leur caractère injuste¹⁰. Plus loin, à l'époque post-tridentine elle sera perceptible dans la plupart des traités canonico-moraux sur le mariage¹¹. Au XIX^{ème} siècle, les diverses congrégations de la Curie romaine, dans leurs *Instructiones processuales*, en font allusion comme étant le passage « de l'état de certitude de la conscience, indispensable pour l'agir moral à la certitude en rapport avec

2005, 231-245; C. IZZI, "La certezza morale nel giudizio canonico", dans P. GHERRI (ed.), *Decidere e guidicare nella Chiesa, Atti della VI^a giornata canonistica interdisciplinare*, Città del Vaticano, Lateran University Press, 2012, 207-229; P. BIANCHI, "La certezza morale e il libero convincimento del giudice", dans P. A. BONNET et C. GULLO (eds.), *Il giudizio di nullità matrimoniale dopo l'istruzione Dignitas Connubii, Parte prima: i principi* (Studi Giuridici 75), Città del Vaticano, LEV, 2007, 387-401; S. GHERRO, "Certezza e formalismo nel processo matrimoniale canonico", dans *Ibidem*, 249-285.

⁷ Cf. E. A. MC. CARTHY, *De certitudine in iudicis animo ad sententiae pronuntiationem requiritur*, Romae, 1948, 110; E. DI BERNARDO, *Accertamento razionale dei fatti nella fase probatoria*, Roma, Lateran University Press, 2002, 41.

⁸ Cf. P. ERDÖ, "La certezza morale nella pronuncia del giudice", 83.

⁹ «*Certitudo proprie dicitur firmitas adhaesionis virtutis cognitivæ in suum conoscibile*»: TOMMASO D'AQUINO, *Commentum in quattuor libros sententiarum Magistri Petri Lombardi*, III, d. 26, q. 2, a. 4.

¹⁰ «*Advertunt autem omnes doctores necessarium esse ut de iniustitia legis certo moraliter constet. Nam si res sit dubia, præsumentum est pro legislatore*»: F. SUAREZ, *De legibus, Edición crítica bilingüe*, vol. 2, Madrid, Corpus Hispanorum de Pace 12, 1972, 14.

¹¹ «*Quia certitudo metaphysica haberi nequit, cum ea quæ ab hominis corde pendent, soli Deo nota sint; ergo sufficit certitudo moralis; hæc autem cum iure definita non sit, nulla certior regula præscribi potest, quam ut site a, quæ virum prudentem, attentis circumstantiis occurrentibus, certum redderet*»: T. SANCHEZ, *Disputationum de sancto matrimonii sacramento*, vol. 2, Venetiis, Tipografia Iuntas, 1625, Lib. II, disp. 45, 192, n. 4.

l'existence d'un fait juridiquement important, conditionné par des preuves judiciaires »¹².

Ce n'est qu'avec le Code Pio-Bénédictin que nous assisterons à l'usage de l'expression "certitude morale" dans la sphère processuelle canonique telle qu'elle nous apparaît sous sa forme législative actuelle. Résultat antérieur de l'intense activité jurisprudentielle des tribunaux ecclésiastiques, elle va donner lieu à la formation du canon 1869 qui énonce en son premier paragraphe que: «*Ad pronuntiationem cuiuslibet sententiae requiritur in iudicis animo moralis certitudo circa rem sententia definiendam*». Il est clair que le législateur faisait plus œuvre de simple disposition de procédure que de doctrine, si bien que le pape Pie XII dans un souci de clarification y reviendra lors de ses allocutions successives aux prélats de la Rote romaine¹³. La plus fameuse fut celle du 1^{er} octobre 1942 y précisant le contenu doctrinal et les contours du concept de certitude morale. La ligne récapitulative se dégageant de son interprétation se formule comme suit:

Entre la certitude absolue et la quasi-certitude ou probabilité, il y a, comme entre deux extrêmes, cette certitude morale dont on traite d'ordinaire dans les questions qui sont soumises à votre tribunal (...). Du point de vue positif, cette certitude morale est caractérisée par ce fait qu'elle exclut tout doute fondé et raisonnable et, qu'ainsi considérée, elle se distingue essentiellement de la quasi-certitude qui a été mentionnée. Ensuite, du point de vue négatif, elle laisse subsister la possibilité absolue du contraire et, en cela, elle se distingue de la certitude absolue¹⁴.

Toutefois en 1970, la réception du concept de certitude morale dans les processus de délibération judiciaire dans le monde anglo-saxon et sa confrontation aux impacts du système traditionnel de la *common law* seront à la base de remous doctrinaux, suite à la concession de normes processuelles par

¹² Cf. SACRA CONGREGATIO CONCILII, Instructio, 22 augusti 1840, dans P. GASPARRI (ed.), *Fontes*, vol. 6, Città del Vaticano, Typis Polyglottis Vaticanis, 1932, n. 4069; SACRA CONGREGATIO EPISCOPORUM ET REGULARIUM, Instructio, 11 iunii 1880, dans *Ibidem*, vol. 4, n. 2005, §.16; SACRA CONGREGATIO SANCTI OFFICII, Instructio ad Episcoporum rituum orientarium, année 1883, dans *Ibidem*, vol. 4, n. 1076, §. 43; SACRA CONGREGATIO DE PROPAGANDA FIDE, Instructio, année 1883, dans *Ibidem*, vol. 7, n. 4901, §. 43.

¹³ Cf. PIUS XII, Allocutio adstantibus Praelatis Auditoribus ceterisque officialibus et administris Tribunalis Sacrae Romanae Rotae necnon eiusdem Tribunalis Advocatos et Procuratoribus haec verba facit, 3 octobris 1941, dans AAS, 33 (1941), 421-426; ID., Allocutio ad prelatos auditores ceterosque officiales et administris Tribunalis S. Romanae Rotae necnon eiusdem Tribunalis Advocatos et Procuratores, 1 octobris 1942, dans AAS, 34 (1942), 338-343; ID., Allocutio ad Prelatos Auditores ceterosque officiales et administris Tribunalis S. Romanae Rotae necnon eiusdem tribunalis Advocatos et Procuratores, 2 octobris 1944, dans AAS, 36 (1944), 281-290.

¹⁴ PIUS XII, Allocutio, 1 octobris 1942, 340-341, n. 1.

le Conseil pour les Affaires Publiques de l'Église aux Conférences Épiscopales Américaine¹⁵ et Australienne¹⁶. De fait au numéro 21 desdits documents, la disposition suivante est perceptible: «*The judge will render his decision according to moral certitude generated by the prevailing weight of that evidence having a recognized value in law and jurisprudence*». Cette formulation, voulant concilier les concepts de certitude morale et de prévalence des preuves dans le procès judiciaire, a eu l'infortune de faire pencher le contenu de la certitude morale vers celui de certitude probable ou quasi-certitude. Ainsi le Pape Jean-Paul II, essayant de définir cette distorsion dans la conception de la notion à l'occasion de son allocution du 4 février 1980, rappellera tout d'abord le caractère authentique des dispositions clarifiant l'allocution de son prédécesseur Pie XII faite en 1942 au sujet de la certitude morale, pour enfin trancher en ces termes : « Il n'est permis à aucun juge de prononcer une sentence en faveur de la nullité d'un mariage s'il n'a pas acquis d'abord la certitude morale de l'existence de cette même nullité. La probabilité seule ne suffit pas pour décider d'une cause. (...) [Elle est une voie] préparée à la tolérance du divorce dans l'Église, sous couvert d'un autre nom »¹⁷. Avec l'entrée en vigueur du Code de 1983, le canon 1608, sur la certitude morale, reprendra à l'identique les dispositions du canon 1869, *CIC/17*, auquel la *DC*, en son article 247 viendra apporter des dispositions quelque peu novatrices.

2 — La définition de la certitude morale

Avant l'entrée en vigueur de la *Dignitas connubii*, le concept de certitude morale au cœur des sessions délibératives concernant les causes de nullité matrimoniale demeurait une notion au contenu imprécis dans nos textes législatifs (c. 1869, *CIC/17*; art. 197 *Provida mater*). Cependant le Pape Pie XII fut le premier¹⁸ à pallier ce manque après le phénomène de la

¹⁵ Cf. CONSILIIUM PRO PUBLICIS ECCLESIAE NEGOTIIS, Rescriptum *Novus modus procedendi in causis nullitatis matrimonii approbatur pro statibus Foederatis Americae Septentrionalis*, 28 aprilis 1970, dans X. OCHOA (ed.), *LE*, vol. 4, Roma, Institutum Iuridicum Claretianum, 1974, col. 5810-5812, n. 3848.

¹⁶ Cf. Id., Rescriptum *Novus modus procedendi in causis nullitatis matrimonii approbatur pro conferentie Episcopalis Australiae territorio*, 31 augusti 1970, dans *Ibidem*, col. 5877, n. 3895.

¹⁷ IOANNES PAULUS II, Allocutio ad Tribunalis Sacrae Rotae Romanae Decanum, Praelatos Auditores, Officiales et advocatos, *Novo litibus iudicandis ineunte anno: De veritate iustitiae matre*, 4 februarii 1980, dans *AAS*, 72 (1980), 176, n. 6.

¹⁸ Cf. P. A. BONNET, "De iudicis sententia ac de certitudine morali", dans *Periodica*, 75 (1986), 80; M. HILBERT, "Le decisioni del giudice (artt. 246-262)", dans P. A. BONNET et C. GULLO

codification, en cherchant à en comprendre la quintessence. La valeur de son interprétation se pose comme un point de départ incontournable dans l'approche de la question.

Pour le Pontife, la certitude morale est cette « adhésion de l'esprit à une proposition qui est caractérisée par ce fait qu'elle exclut tout doute fondé et raisonnable et, (...) laisse subsister la possibilité absolue du contraire »¹⁹. Cette définition sera reprise par l'article 247, §2, *DC*²⁰. La certitude morale ainsi présentée, est une conviction qui se perçoit à la lumière de deux aspects : un premier, qui est intérieur, intra personnel, et un second qui, lui, est carrément extérieur, extra personnel. L'élément intérieur, parce qu'il se situe au niveau cognitif dans l'esprit des juges est celui du « doute fondé et raisonnable » contre le jugement qui doit moralement résulter inexistant. Il éprouve la qualité du jugement à l'image du scepticisme cartésien qui conduit à éliminer tous les doutes possibles dans l'appréciation d'une réalité jusqu'à atteindre la partie indéfectible de la certitude du jugement à savoir « la vérité et la crédibilité »²¹. Par définition, « le doute est une interrogation. Il est le pressentiment ou l'impression d'une réalité différente »²². Il est une hésitation. Ainsi la certitude morale est-elle une évaluation rigoureuse du juge qui ne doit pas laisser apparaître substantiellement le moindre motif rationnel de doute ou d'hésitation. Autrement dit, tant qu'il subsiste raisonnablement dans l'esprit d'un juge l'ombre de la moindre hésitation pour apprécier un cas d'espèce, son jugement donnera lieu à un résultat incertain. Le second élément quant à lui, ne saurait provenir de l'esprit du même juge qui se met à

(eds.), *Il giudizio di nullità matrimoniale dopo l'istruzione Dignitas Connubii, Terza parte: Parte dinamica del processo* (Studi Giuridici 77), Città del Vaticano, LEV, 2008, 561.

¹⁹ PIUS XII, Allocutio, 1 octobris 1942, 342, n. 5.

²⁰ « §1. Ad declarandam nullitatem matrimonii requiritur in iudicis animo moralis certitudo de eisdem nullitatem. §2. Ad certitudinem autem moralem iure necessariam, non sufficit praevalens probationum indiciorumque momentum, sed requiritur ut quolibet quidem prudens dubium positivum errandi, in iure et in facto, excludatur, etsi mera contrarii possibilitas non tollatur. §3. Hanc certitudinem iudex haurire debet ex actis et probatis. §4. Probationes autem aestimare iudex debet ex sua conscientia, firmis praescriptis legis de quarundam probationum efficacia. §4. Iudex qui hanc certitudinem post diligens causae examen adipisci non potuit, pronuntiet non constare de nullitate matrimonii, firmo art. 248, §5 ».

²¹ Cf. S. CARAMELLA, "Certezza", dans *Enciclopedia filosofica*, vol. 1, 1808; D. VICARI, *La certezza morale nell'attività giudiziale canonica*, Theses ad doctoratum in Iure Canonico, Roma, Pontificia Università Lateranese, 1996, 60 et 171; R. NAZ, *Traité de Droit Canonique, Des procès, Des délits, Des peines*, vol. 4, Paris, Letouzey et Ané, 1935, 337.

²² « Le doute peut avoir deux effets sur l'esprit du juge : un délétère, l'autre salutaire. Le doute dans une âme faible et paresseuse porte à la négligence. Dans la personne qui ne renonce pas à la recherche de la vérité, à l'inverse il suscite une réelle impulsion à sa découverte » : M. POMPEDDA, *Studi di Diritto Processuale Canonico*, Milano, Giuffrè Editore, 1995, 177.

l'épreuve de la certitude. En réponse au principe de la *favor veritatis*²³, il s'agit d'une marge d'éventualités qui laisse subsister la possibilité d'une évaluation extérieure contraire au jugement résultant de la certitude morale. Cette évaluation peut émerger soit des autres juges du *turnus* commis à la cause (au sein du même collège judiciaire), soit dans le cas du juge unique, dans le cadre des contrôles extra-processuels émanant des instances supérieures, lors des appels.

Dans son aspect générique, la certitude morale est « une certitude judiciaire »²⁴ puisqu'elle ne subsiste que dans la sphère processuelle en tant qu'une tâche intégrant la compétence juridictionnelle du juge²⁵. Elle est entendue comme un état d'esprit, d'intériorité ou encore un état de conscience, qui par ailleurs n'émane pas d'une intuition ou d'une impression passagère. Elle est conséquence d'une activité intellectuelle qui prend forme à l'intérieur d'un contexte. Sous cet angle, la certitude morale n'est rien d'autre qu'un état de connaissance ou de conviction intellectuelle en lien avec la découverte de la vérité²⁶.

Cette conviction intellectuelle peut aussi être entendue comme « un état psychologique »²⁷ que le juge est enclin à atteindre et qui le conduit au

²³ Le principe de la *favor veritatis* dans l'esprit des juges s'articule autour de l'exigence ou de la recherche de la vérité et du souci bien affirmé de la protéger. Dans la formation *ad intra* de la décision relative à la nullité matrimoniale en particulier, la *favor veritatis* consiste, comme l'affirmait Saint THOMAS D'AQUIN, à la « *conformitas vel adæquatio intellectus ad rem* » (TOMMASO D'AQUINO, *La somma teologica*, vol. 30, II, II, q. 21, a. 2, c.). Elle est à la fois vérité-correspondance et vérité-cohérence. Vérité-correspondance, dans la mesure où elle a pour objet la conformité du jugement du cas d'espèce à la norme canonique en vigueur. Vérité-cohérence, en tant qu'elle résulte de l'absence de contradiction dans la pensée du juge qui se dégage de la libre appréciation *ex actis et probatis* de la cause en question avec la norme en vigueur (J. LLOBELL, "La modificación *ex officio* de la formula de la duda, la certeza moral y la conformidad de las sentencias en la instrucción *Dignitas Connubii*", dans *IC*, 46 [2006], 149-148). En ce sens, sa valeur et sa prédominance se perçoivent concrètement dans la mise en œuvre du sens critique des juges aussi bien dans l'appréciation des éléments de la *questio iuris* que de la *questio facti* de la cause pour atteindre la *veritas cognitionis* ou *veritas logica*. Il s'agit d'une tâche qui n'exclut pas la possibilité d'erreurs. Ce caractère de recherche de la vérité fonde l'objectivité même de la décision de justice dont la forme externe de la sentence s'en fait l'écho.

²⁴ C. IZZI, "La certezza morale nel giudizio canonico", 213.

²⁵ Cf. P. BIANCHI, "Certeza morale e libero convincimento del giudice", 389.

²⁶ « Cette certitude morale garantit au juge d'avoir trouvé la vérité du fait à juger, c'est-à-dire la vérité qui est le fondement, la mère et la loi de la justice et lui donne donc l'assurance d'être — de ce point de vue — à même de prononcer une sentence juste »: IOANNES PAULUS II, Allocutio, 4 februarii 1980, 176, n. 6; cfr. M. LEGA et V. BARTOCCEI (eds.), *Commentarius in iuridicia ecclesiastica iuxta Codicem Iuris Canonici*, vol. 2, 934.

²⁷ A. STANCKIEWICZ, "La certezza morale e la motivazione della sentenza", 237.

jugement d'une cause dans le sens de la vérité. Elle se différencie de l'évidence qui se rapporte surtout à la qualité d'un objet. Cette conviction qui se forge dans l'esprit du juge précise le Pape Pie XII, « s'appuie sur la constance des lois et des coutumes qui gouvernent la vie humaine »²⁸. En d'autres termes, la certitude morale se bâtit sur un postulat juridique, constitué des dispositions de Droit divin, naturel et positif ecclésiastique, mais aussi à partir de la coutume, au sens des usages *secundum legem* ou *præter legem* admis dans les mœurs communes et qui déterminent l'agir des hommes en société (c. 5).

3 — *La singularité de la certitude morale canonique devant d'autres types de certitude*

L'intérêt de cette distinction analogique consiste non seulement à mettre l'accent sur la spécificité de la certitude morale en rapport avec d'autres genres de certitude ayant cours dans certaines disciplines, mais aussi à comprendre les motifs de son choix préférentiel au for canonique, puisque le législateur aurait pu établir un autre type de certitude à atteindre dans la formation de la décision. Nous nous limiterons donc à de simples présentations à partir desquelles se déduisent les comparaisons.

La certitude psychologique est un « état de conscience sûre portant sur une notion, qu'elle soit sensible ou abstraite, ayant pour objet notre propre existence »²⁹. Elle se réfère à un état mental caractérisé par l'absence de doute. Elle est adhésion aux affirmations de la conscience. La notion de certitude psychologique ne saurait être une condition suffisante dans l'acquisition d'un savoir, car il est possible d'être absolument convaincu d'une proposition objectivement fausse. La certitude logique est la cohérence spontanée qui s'établit entre les représentations matérielles et les notes conceptuelles spécifiques³⁰. En elle, la vérité est perçue sous la forme de persuasion subjective, demeurant tout de même fondée sur l'objectivité du vrai. Cette forme de certitude est promue par l'évidence. En tant que certitude mathématique, elle est élevée à la mesure de critère décisif par la méthode des sciences inductives et expérimentales, dans la perspective de la reconnaissance de l'universalité des lois. Cependant, on ne peut l'employer dans les

²⁸ PIUS XII, *Allocutio*, 1 octobris 1942, 339, n. 1.

²⁹ G. STANGHELLINI, "Coscienza II", dans *Psiche, Dizionario storico di psicologia, Psichiatria*, vol. 1, 271-275.

³⁰ Cf. C. PERNOT, "Certitude", dans *Encyclopédie philosophique universelle, Les notions philosophiques*, 294.

procès de nullité matrimoniale puisque, dépourvue du caractère anthropologique, il ne s'agit que d'une certitude conceptuelle, scientifique.

La certitude physique est celle qui s'attache aux notions résultant de la perception externe suite à l'impression des objets extérieurs sur les organes de nos sens. Cette certitude est réelle en tant qu'elle est fondée sur les lois de la nature ou sur l'expérience³¹. Ce type de certitude est intuitif car résultant de l'impression produite par les objets extérieurs sur notre jugement. Elle ne convient pas au cadre de la déclaration de nullité matrimoniale, la tangibilité du mariage exigeant un jugement au-delà d'une simple impression. La certitude métaphysique pour sa part est la certitude de la vérité et des réalités supra sensibles desquelles on peut avoir soit une connaissance directe, intuitive, soit une connaissance indirecte, démonstrative, réductible au principe de la non-contradiction. Elle est fondée sur l'essence des choses et traite des principes métaphysiques, des réalités complètement éloignées des aspects pragmatiques du mariage.

La certitude juridique « se réfère à la stabilité des décisions dans le système judiciaire civil, fondée sur l'autorité et l'indépendance reconnues à la magistrature dans le cadre de la séparation de pouvoirs »³². Elle est perceptible:

Scientifiquement comme la plénitude de l'action de droit, en vue de son expression et de sa formulation, en tant que capable de résumer toute la spontanéité et l'autonomie de la partie qui agit et suffisante à s'identifier avec la vérité dans la justice. La certitude juridique précède donc l'idée de justification rationnelle, bien qu'elle puisse et doive être nourrie par d'autres raisons et par la certitude morale dans sa sincérité et sa véracité³³.

Enfin, la certitude morale, en tant que conviction cognitive de la conscience personnelle à la lumière du bien et de la *favor veritatis*, est fondée sur l'induction à partir de preuves et sur le témoignage, autrement dit, sur le mode constant ou habituel de l'agir humain. Le qualificatif de moral est surtout dû à son caractère purement anthropologique³⁴. Elle concerne l'agir constant des hommes pourvus de liberté. D'une certaine manière, la certitude

³¹ Cf. R. NAZ, *Traité de Droit Canonique, Des procès, Des délits, Des peines*, vol. 4, 337.

³² G. KEMA, *La sentence ecclésiastique dans le système judiciaire canonique, Synthèse de la jurisprudence de la Rote Romaine en matière d'incapacité assumendi (c. 1095, n. 3) de 1990-2010*, Extractum ex dissertatione ad doctoratum in Iure Canonico, Romae, Pontificia Universitas Urbaniana, 2013, 55.

³³ D. VICARI, *La certezza morale nell'attività giudiziale canonica*, Theses ad doctoratum in Iure Canonico, Roma, Pontificia Università Lateranese, 1996, 60.

³⁴ Cf. M. MARTIN, "La certeza moral", dans *Diccionario General de Derecho Canónico*, vol. 2, 56.

morale est indéterminée à la différence de la certitude physique qui, elle, est limitée. Le législateur l'a préférée non seulement dans la mesure où elle assume parfaitement la logique applicative des lois³⁵ aux cas d'espèce pour en déduire les conclusions, mais aussi dans sa relation avec les autres types de certitudes, elle porte plus au réalisme pratique en indiquant la prudence³⁶ nécessaire à la résolution des problèmes au sein de la société. En effet, il ne faut pas ignorer que l'Homme, considéré dans sa totalité, n'est pas uniquement une somme de lois ou de vérités logiques, physiques, ou encore psychologiques. En cela, l'exigence de la certitude morale dans le règlement des causes matrimoniales a l'avantage de tenir compte de tous les aspects humains.

4 — *L'objectivité de son caractère*

La certitude morale, en tant que conviction émergeant de la conscience personnelle du juge (c. 1608, §3, *CIC*; c. 1291, §3, *CCEO*), comporte le risque de quelques empreintes de subjectivité. Au même moment, le Pape Pie XII, dans son allocution à la Rote de 1942, rappelait son caractère essentiellement objectif fondé sur les *iuxta acta et probata* argués en la cause³⁷. Que faut-il alors comprendre ?

Le risque de la subjectivité ou de l'arbitraire dans la certitude morale résiderait dans sa dimension appréciative des faits émergeant de la cause. En tant qu'activité de l'intelligence, ayant pour siège la conscience du juge considérée comme le « noyau de la décision personnelle, autour duquel gravitent les doctrines faisant autorité, les conventions sociales qui lui donnent matière à délibération »³⁸, il s'agit d'une évaluation critique, d'une analyse logique déductive, en référence au syllogisme qui contribue à la formation d'un jugement personnel. D'une part, le problème émanerait de l'impact ou

³⁵ Cf. J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canónico*, 169-172.

³⁶ «Esta certeza moral se llama también “práctica” y “prudencial” porque es suficiente para proceder con prudencia en las cuestiones prácticas de la vida, en las que no puede exigirse otra certeza. Precisamente por ser suficiente para proceder con prudencia en estas cuestiones prácticas de la vida es también suficiente para proceder con prudencia en las decisiones judiciales que, además de ser también cuestiones prácticas de la vida, se toman sobre cuestiones prácticas de la vida»: *Ibidem*, 175.

³⁷ Cf. PIUS XII, *Allocutio*, 1 octobris 1942, 340, nn. 2-3.

³⁸ J. WEBSTER, “Conscience”, dans *Dictionnaire critique de théologie*, 258; MENGAL parle aussi de «principe intellectuel qui nous permet d'évaluer la différence entre le bien et le mal, en garantissant l'exercice du libre arbitre»: P. MENGAL et M. RICHELLE, “Coscienza”, dans *Nuovo dizionario di psicologia*, 188.

de l'influence que les expériences personnelles du juge, gravées dans sa conscience, pourraient avoir sur son appréciation d'une cause donnée³⁹. En effet, avec les avancées de la science psychologique, il est démontré que l'homme est le fruit d'une histoire qui lui forge non seulement un tempérament, un caractère, mais aussi un mode de raisonnement et de compréhension des réalités. En outre, il subit l'impact de ses échecs comme de ses réussites, en tant que partie intégrante de son expérience humaine. De sorte que malgré l'existence de la loi et du mode d'interprétation spécifique définis authentiquement par le législateur, l'homme reste bien souvent tributaire de son histoire personnelle. Dans cette perspective, la subjectivité de la certitude morale consisterait pour les juges à être influencés par une expérience ou une conviction personnelle dans l'appréciation d'une cause⁴⁰. D'autre part, la subjectivité de la certitude morale se situerait dans le fait qu'une opinion fondée sur la probabilité puisse être soutenue avec tant de force qu'elle se transforme injustement en certitude. En pareille situation, le risque est grand de confondre ses désirs avec la réalité à laquelle il faut s'en tenir. Et il peut en être de même pour l'adhésion au faux, c'est-à-dire l'erreur, dans laquelle se vérifie également une certitude subjective⁴¹.

Toutefois, devant ces objections à l'exigence de la certitude morale dans le procès matrimonial canonique, le docteur Angélique avait déjà allégué une position assez explicite en ces termes:

[Le juge] doit former son opinion non pas selon ce qu'il sait en tant que personne privée, mais d'après ce qui est porté à sa connaissance en tant que personnage public. Or cette connaissance lui parvient d'une façon générale et d'une façon particulière par les lois publiques, divines ou humaines (...). Il devra les suivre dans son jugement, de préférence à ce qu'il a appris comme personne privée⁴².

³⁹ «Le mot "Conscience" vient du latin *cum-scientia* et évoque l'idée d'un connaître-avec, c'est-à-dire le savoir d'un témoin qui partage quelque chose de la réalité, de l'évènement, de l'intrigue. (...) Ce *cum* se conjugue avec l'idée d'expérience de soi construite dans la récapitulation du savoir, la mémoire [la somme des expériences acquises]. Ce que note également la construction symétrique grecque (*sun-eidēsis*) ou encore l'allemand qui adjoint au radical *wissen* (savoir, selon deux modalités grammaticales) le préfixe *ge-* (*Gewissen*) ou *be-* (*Bewusstsein*) impliquant à chaque fois une fonction associative»: J. THIEL, "Conscience", dans *Dictionnaire encyclopédique d'éthique chrétienne*, 438.

⁴⁰ J. RAMOS et P. SKONIECZNY, *Diritto Processuale Canonico*, vol. 2, Romae, Angelicum University Press, 2014, 45-47.

⁴¹ Cf. A. STANKIEWICZ, "La certezza morale e la motivazione della sentenza", 238.

⁴² TOMMASO D'AQUINO, *La Somma Teologica*, vol. 31, IIa-IIæ, q. 67, a. 2, c; cfr. B. CAVALONE, "Il divieto di utilizzazione della scienza privata del giudice", dans *Rivista di Diritto Processuale*, 64, 4 (2009), 861-873.

S'en inspirant dans sa fameuse allocution de 1942, Pie XII répondra à la question. La certitude morale :

est entendue comme une certitude objective c'est-à-dire basée sur des motifs objectifs; et non comme une certitude purement subjective qui se fonde sur un sentiment ou une opinion exclusivement subjective sur telle ou telle réalité, ou encore sur la crédibilité personnelle. Une telle certitude morale objectivement fondée ne s'obtient pas, si à preuve du contraire, des motifs n'existent pas⁴³.

En fait, « l'objectivité de la certitude morale jaillit de motifs qui eux-mêmes excluent toutes probabilités »⁴⁴. La référence à la conscience du juge n'a pas une signification psychologique ou morale. Elle s'entend plutôt dans un cadre juridico-processuel, comme l'application des facultés naturelles, cognitives aux déductions probatoires, afin d'en opérer l'évaluation critique: un discernement qui interpelle la rationalité, l'autonomie et la responsabilité du juge, en tant que personne investie d'une autorité publique⁴⁵.

En effet, le caractère objectif de la certitude morale s'établit selon des critères processuels prédéfinis que le juge est tenu d'observer dans la formation de sa conviction personnelle et dans l'interprétation des actes et des preuves allégués durant le traitement de la cause⁴⁶. Ainsi, observons-nous une objectivité à double dimension: l'une, *ab extrinseco* et l'autre, *ab intrinseco*⁴⁷.

L'objectivité *ab extrinseco* de la certitude morale tient au respect du formalisme processuel que requiert l'obligation de motivation des sentences

⁴³ PIUS XII, Allocutio, 1 octobris 1942, 341, n. 3.

⁴⁴ A. STANKIEWICZ, "La certezza morale e la motivazione della sentenza", 237; E. GRAZIANI, "La certezza morale oggettivamente fondata", dans *DE*, 53 (1942), 341.

⁴⁵ ARROBA CONDE écrit justement que: « la certezza morale si intende normalmente come uno stato d'animo soggettivo dell'autorità giudiziale, ma fondato in criteri oggettivi. Se l'oggettività risiede in applicare regole di valutazione ugualmente oggettive, allora sarà possibile sostenere che la certezza morale è inseparabile dall'idoneità della decisione ad essere convincente in coscienza per i destinatari »: M. J. ARROBA CONDE, *Risultato della prova e tecnica motivazionale nelle cause matrimoniali, Casi pratici di prima istanza*, Roma, Lateran University Press, 2013, 8.

⁴⁶ « Circa l'oggetto della certezza morale, sebbene nel disposto del canone 1608, §1 si faccia riferimento (con una formula alquanto generica) alla certezza circa "rem sententia definienda", il magistero pontificio, espresso nelle citate Allocuzioni, esprime la necessità di raggiungere la certezza morale circa il fatto da giudicare; ricorrentemente risultano espressioni quali la "verità del fatto" »: E. DI BERNARDO, *Accertamento razionale dei fatti nella fase probatoria*, Roma, Lateran University Press, 2002, 45.

⁴⁷ Cf. C. IZZI, "La certezza morale nel giudizio canonico", 226-227; STANKIEWICZ emploiera à la suite des papes PIE XII et PAUL IV, l'expression « Formalisme juridique » pour indiquer l'objectivité *ab extrinseco* de la certitude morale: A. STANKIEWICZ, "La certezza morale e la motivazione della sentenza", 238-239.

canoniques en général⁴⁸. Ce dernier (précisez le sujet) est une donnée objective qui, portée devant les parties en cause et devant le tribunal d'instance supérieure doit être capable de communiquer sans parti pris la certitude morale des juges⁴⁹. Par ailleurs, l'objectivité *ab intrinseco* de la certitude morale se déduit de l'appréciation *ex actis et probatis* émise en la cause en tant qu'« ultime critère de vérité, motif essentiel et unique fondement »⁵⁰. Ces deux notions méritent d'être considérées séparément. Pour saint Jean-Paul II, « le terme *ex actis* fait référence surtout aux actes du procès en leur qualité de sources de vérité »⁵¹. Il s'agit « des assertions et négations, des pétitions et refus intervenus au cours du jugement »⁵². Le juge est appelé à les scruter attentivement. C'est dire qu'en aucun cas, précise le canon 1604, §1, il ne devra faire usage d'éléments extra-processuels, basés sur un quelconque intérêt personnel ou sur des motifs relationnels (de type parenté ou amitié). Le terme *ex probatis* se réfère aux preuves. « Le juge ne [doit] pas se limiter à donner du crédit aux seules affirmations; au contraire, il doit avoir présent à l'esprit durant la phase d'instruction du procès, que la vérité objective ait pu être altérée par diverses causes possibles comme l'oubli de certains faits, leur interprétation subjective, le dol et la fraude. Ici entre en ligne de compte le sens critique des juges »⁵³.

En définitive, la certitude morale est une certitude réaliste, fruit : « D'une conviction (...) ou d'un raisonnement humain, fondée sur des raisons objectives, qui exclut tout doute sérieux et avisé. Puisqu'elle exclut la probabilité, mais non la possibilité à l'erreur, la certitude morale n'atteint pas la mesure de l'absolu que comportent les certitudes physique et métaphysique; il s'agit au contraire d'une "certitude morale pratique", c'est-à-dire cette conviction pratique, idoine et suffisante nécessaire pour agir et opérer avec prudence dans les actes de la vie concrète »⁵⁴.

⁴⁸ Cf. M. POMPEDDA, *Studi di Diritto Processuale Canonico*, 179; J. LLOBELL, "La genesi della sentenza canonica", 704; C. IZZI, "La certezza morale nel giudizio canonico", 227.

⁴⁹ Cf. J. LLOBELL, "Oggettività e soggettività nella valutazione giudiziaria delle prove", dans *QDE*, 14 (2001), 767.

⁵⁰ A. STANKIEWICZ, "La certezza morale e la motivazione della sentenza", 240.

⁵¹ IOANNES PAULUS II, *Allocutio*, 4 februarii 1980, 175, n. 5; cfr. C. AGDE, *La certitude morale dans les procès canoniques de nullité matrimoniale (Can. 1608), A la lumière du magistère de PIE XII à BENOÎT XVI et de la jurisprudence de la Rote Romaine*, Roma, Pontificia Università Lateranense, 2009, 12-13.

⁵² Cf. Z. GROCHLEWSKI, "La certezza morale come chiave di lettura delle norme processuali", 430-431.

⁵³ IOANNES PAULUS II, *Allocutio*, 4 februarii 1980, 177, n. 7.

⁵⁴ C. IZZI, "La certezza morale nel giudizio canonico", 213.

5 — La formation de la certitude morale dans les causes de nullité matrimoniale selon le contentieux ordinaire

L'option de la certitude morale dans la déclaration de nullité du mariage se focalise sur la définition de la *formula dubii* en tant qu'objet principal à l'origine de la mise en œuvre du dispositif processuel (c. 1608, §1), et auquel ce dernier apporte une réponse à travers la sentence. Selon la *praxis* judiciaire ecclésiastique, la définition de cette *petitio principalis* s'organise autour d'arguments libellés *in iure* et *in facto*. Ainsi, la formation de la certitude morale doit-elle être perçue à l'intérieur de cette double exigence.

5.1 — Dans la “*quæstio iuris*”

La *quæstio iuris* dans la formation de la certitude morale nous renvoie surtout à la correspondance du cas d'espèce à la norme juridique. Pour les juges, ce procédé requiert non seulement une interprétation correcte des lois qui se traduit par une fidélité absolue à celles-ci⁵⁵ en conformité avec la *mens legislatoris*, mais aussi une grande dextérité dont la diligence et la prudence juridiques en sont de singulières expressions. A ce niveau, toutes marges d'erreurs, aussi infimes qu'elles puissent paraître⁵⁶, présentent au regard de la subtilité du cas, des conséquences malheureuses sur la qualité du jugement.

5.1.1 — L'exigence de loyauté dans l'interprétation des lois

Si au moment de la formation de la certitude morale dans l'élément *in iure*, la difficulté majeure demeure le principe de la fidélité à la loi, comment cette dernière s'opère-t-elle de façon concrète? La réponse est circonscrite autour de deux idées. D'un côté, le concept de fidélité à la loi n'est pas à entendre dans le sens d'une activité automatique ou intuitive d'application

⁵⁵ Cf. IOANNES PAULUS II, Allocutio, 4 februarii 1980, 178, n. 9.

⁵⁶ J. LLOBELL rappelle que PIE XII, dans son allocution de 1942 à la Rote Romaine, n'applique pas le concept de certitude morale à la *quæstio iuris*. La raison de ce choix réside dans le caractère fixe et déterminé des normes juridiques, qui, de fait ne saurait constituer un problème. La certitude morale se pose plutôt avec acuité dans la formation de la *quæstio facti* (cfr. ID., “La genesi della sentenza canonica”, 703-704). Face à cette position, il faut cependant rappeler les précautions que recommande ARROBA CONDE, pour lequel la certitude morale est un prérequis tout à fait nécessaire dans l'identification de la loi, suivant le principe de l'*ex facto oritur ius* (l'induction de la norme à partir des faits circonstanciels). En effet, ce n'est pas d'une évidence toute faite et il peut subsister des possibilités d'erreurs: cfr. M. J. ARROBA CONDE, *Diritto Processuale Canonico*, 6^{ème} éd., Roma, Edurcla, 2012, 532.

de la norme aux cas, sans en mesurer les subtilités. Ce serait faire preuve d'un rigorisme servile⁵⁷. De l'autre, en évitant cet extrême, il ne faut pas non plus céder à une liberté illimitée, qui sous-entendrait une interprétation excessive et extensive des textes de lois avec le risque de s'éloigner de l'esprit et de leur contenu définis par le législateur.

La fidélité à la loi doit plutôt intégrer pour le juge, l'obligation de l'interpréter dans la droite ligne recommandée par la *mens legislatoris*. Elle prend en compte le motif objectif qui l'a induit à émaner une loi donnée avec son contenu et ses aspirations profondes, les expériences humaines inspiratrices de toute son activité de gouvernement et particulièrement celles spécifiques à sa charge législative. C'est dire que l'activité interprétative des juges, soutenant le rapport normes et faits, implique une corrélation fine et intelligente de la loi dans ses contours et ses contraintes, à la diversité des problèmes qui émanent du vécu quotidien des hommes en société. Parfois dans cette logique interprétative, le juge se servira de l'*épikèia*, en guise de démarche de raisonnement⁵⁸. En effet, formalisée au canon 17⁵⁹, elle traduit dans la doctrine canonique le besoin de se conformer à la *mens legislatoris* dans la tâche d'interprétation des lois, quand sont en cause, l'obscurité ou l'ambiguïté des termes de la loi. L'*épikèia* peut apparaître ainsi non seulement comme « l'explication de son sens concernant les points sur lesquels il existe une ambiguïté »⁶⁰, mais aussi comme une correction de la loi ou de ce qui est légalement juste selon Aristote⁶¹. Elle diffère de l'équité canonique qui assume « un rôle d'équilibre des valeurs dans les relations de justice interpersonnelle et dans la particularisation de la règle de droit »⁶².

⁵⁷ Cf. J. GARCÍA FAÍLDE, *Nuevo Derecho Procesal Canonico (Estudio sistematico-analitico comparado)*, 171.

⁵⁸ Car « le concept d'interprétation de la loi est beaucoup plus étendu que celui de l'*épikèia*. (...) Toute *epikeia* est une interprétation de la loi; mais, à l'inverse, toute interprétation de la loi n'est pas identifiable à l'*epikeia* »: F. SUAREZ, *Des lois et du Dieu législateur*, Paris, Dalloz, 2003, 583.

⁵⁹ Dans ce canon, le terme nous référant à l'*épikè* est « *mens legislatoris* ». Il figure au nombre des critères subsidiaires qui entrent en ligne de compte lorsque le premier critère n'assure pas une compréhension convenable de la loi en rapport au cas d'espèce: cf. V. DE PAOLIS, "Il libro primo del codice: Norme generali (cann. 1-203)", dans GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (ed.), *Il Diritto nel mistero della Chiesa*, 3^{ème} ed., vol. 1, Roma, Lateran University Press, 296-298.

⁶⁰ Cf. F. SUAREZ, *Des lois et du Dieu législateur*, 583-584.

⁶¹ Cf. ARISTOTELE, *Etica Nicomachea*, Opere di Aristotele VII, Bari, 1973, V, 15, 1138 a, 20-24.

⁶² Dans le système canonique en général, le sens de l'équité renvoie au fameux dicton du cardinal d'OSTIE: « *Iustitia dulcore misericordiae temperata* » (HENRICUS A SEGUSIA [HOSTIENSIS], *Summa Aurea*, lib. V, *De dispensationibus*). L'équité est l'expression de la justice que doit promouvoir le législateur dans l'application des lois qui régissent les rapports entre

En plus, cette tâche d'interprétation des lois fait appel à la diligence et à la prudence juridiques, qualités requises pour l'exercice de la charge judiciaire. Celles-ci au cœur de la procédure judiciaire obligent le juge à tenir compte des circonstances culturelles de l'environnement dans lequel évoluent les conjoints, non seulement pour connaître la réalité, au sujet de la norme à appliquer qui serait juste, mais aussi l'intégrer dans la configuration même de la loi, comme procède habituellement le positivisme juridique en relativisant tout concept éthique⁶³. Enfin, dans la formation de la certitude morale quant à l'élément *in iure*, le juge doit évincer de son esprit la possibilité du doute et faire preuve d'exactitude dans son choix de la norme. Mais, il n'est pas exclu que les résultats de son analyse soient sujets à l'erreur et les rendent opposables.

5.1.2 — Une connaissance sûre de la doctrine matrimoniale canonique

La tâche de correspondance du cas à la norme juridique impose aux juges une certaine dextérité. En réponse à celle-ci, il faut d'abord que ces derniers possèdent la loi dans toute sa teneur et s'en imprègnent parfaitement. Cette parfaite connaissance s'acquiert à travers une solide préparation canonique⁶⁴.

les sujets de droit. Mais plus qu'une simple justice qui est application rigoureuse de la loi, celle-ci doit faire appel aux principes que sont la miséricorde, la bénignité et la charité en leur qualité d'éléments d'équilibre (PAULUS VI, Allocutio ad praelatos auditores, officiales et advocatos Tribunalis Sacrae Romanae Rotae, 27 ianuarii 1969, dans AAS, 61 [1969], 174-178). En clair «la notion d'équité dans le code met en évidence une préoccupation constante du législateur: assurer la justice en même temps que le respect dû aux personnes et aux fidèles en tant que tels, en tempérant la rigueur d'une mesure par une disposition adaptée au cas particulier ou en instituant une instance de concertation en vue d'une solution»: W. WITTERS, "Équité et opportunité dans le Code de Droit Canonique", dans AC, 28 (1984), 53; cfr. L. DE NAUROS, "L'équité dans les droits canonique et Français contemporains", dans AC, 26 (1982), 31-61.

⁶³ Cf. J. LLOBELL, "La genesi della sentenza canonica", 706.

⁶⁴ Le Pape ALEXANDRE III (1159-1181) recommandait à un Abbé ordinaire de lieu: «*Non sunt causae matrimonii tractandae per quoslibet, sed per iudices discretos, qui potestatem habeant iudicandi, et statuta canonum (...) non ignorent*»: ALEXANDER III, *De consanguinitate et affinitate*, c. 1, X, IV, 14. En outre l'on peut observer en introduction à la *Dignitas Connubii* que: «*Fatendum est etiam hodie valere et quidem maiore urgentia quam tempore quo edita est instructio "Provida Mater", animadversionem quam subiungit ipsa instructio: "Attamen animadvertatur oportet eiusmodi regulas insufficientes ad propositum finem evasuras esse, nisi dioecesani iudices sacros canones apprime calleant et forensi experientia bene sint instructi"*» (AAS, 28 [1936], 314). *Quapropter, episcoporum est, graviter onerata eorumdem conscientia, curare ut idonei ministri iustitiae pro suis tribunalibus apte et tempestive in iure canonico efformentur atque in foro iudiciali ad causas matrimoniales rite instruendas ac recte decidendas opportuna exercitatione praeparentur*»: DC, proemium.

D'un côté, nous avons les cas d'espèces qui émanent de la pluri-dimension des expériences anthropologiques et sociologiques de l'Homme. De l'autre, le législateur, entrant dans le réalisme de ces expériences, les prend en compte en définissant des normes aux fins du bien commun. Le rôle du juge muni d'une parfaite maîtrise du droit, consiste à faire œuvre de casuistique dans sa tâche d'interprétation, c'est-à-dire relier le cas en cause à un référent normatif dans les textes de lois prévues par le législateur⁶⁵. Dans la sphère de la déclaration de nullité matrimoniale, les motifs sont déjà déterminés ou définis de manière stéréotypée (cc. 1055-1057; 1083-1094; 1095-1103; 1108-1123). En outre, cette connaissance approfondie de la doctrine juridique ne se limite pas qu'à une simple possession des textes normatifs. Bien plus, elle oblige à des liens avec la jurisprudence⁶⁶ et les œuvres de doctrine au regard surtout de la flexibilité et de la complexité des raisonnements qu'imposent parfois certains cas, dans leur rapport avec la norme objective (la règle de droit). Toutefois, la connaissance approfondie du droit matrimonial à elle seule ne saurait suffire. Encore faut-il la mettre en œuvre avec diligence et prudence.

«L'acte de jugement de valeur à caractère canonico-juridique, présuppose l'idonéité et la compétence du juge lui-même, et donc la possession de la science nécessaire pour l'exercice de son *munus* par lequel il détermine cas par cas les critères décisionnels, n'ayant tenu compte des principes généraux de l'herméneutique canonique, des règles de la logique et de l'expérience judiciaire»: A. STANKIEWICZ, "Le caratteristiche del sistema probatorio canonico", 111.

⁶⁵ C'est le propre de la dynamique inductive en tant que procédé de logique en usage dans le milieu judiciaire canonique. Elle part des propositions inductives le plus souvent singulières, pour aboutir à une proposition ou à un principe plus général. Etant une très ancienne méthode de raisonnement, elle s'est imposée à la démarche juridique en général comme science, puisqu'elle permet de dégager les lois d'ordre public à partir des faits journaliers observés. Dans l'ordonnement canonique, les juges ecclésiastiques s'en servent presque par réflexe dans la formation de la *quæstio iuris*, qui consiste fondamentalement à l'identification de la norme canonique applicable, suivant l'adage romain «*Narra mi factum et dabo tibi ius!*». A partir des circonstances du cas d'espèce, les juges rejoignent dans une démarche ascendante la norme juridique correspondante de laquelle ils définiront la cause: cf. M. TARUFFO, *La motivazione della sentenza civile*, Padova, Casa Editrice Dott. Antonio Milano, 1975, 158.

⁶⁶ Le concept de jurisprudence pourrait s'entendre comme «*comprobata uniformis norma iuris dicendi seu leges practice interpretandi et applicandi in tribunalibus*», c'est-à-dire «*complexus decisionum uniformium seu uniformiter latarum a tribunalibus, in effectivo exercitio propriæ functionis iurisdictionalis*»: Z. VARALTA, "De iurisprudentiæ conceptu", dans *Periodica*, 62 (1973), 39-57, avec une mention particulière à la page 42; cfr. V. DE PAOLIS, "La giurisprudenza del Tribunale della Rota Romana", dans *QSR*, 18 (2008), 130-165; E. BAURA, *Parte Generale del Diritto Canonico, diritto e sistema normativo*, Roma, EDUSC, 2013, 219.

5.2 — Dans la “*quæstio facti*”

La formation de la certitude morale dans la *quæstio facti* tient à la *favor veritatis* objectivement fondée en sa qualité de fin ultime de l’activité judiciaire⁶⁷. Pour les juges, cette activité consiste en une évaluation attentive des preuves et des actes se rapportant intrinsèquement aux faits en cause dans la procédure, aux fins d’affermir en eux la ferme conviction de la validité ou non du lien matrimonial. Celle-ci est néanmoins présidée par une présomption légale: la *favor matrimonii*⁶⁸.

5.2.1 — La présomption de la “*favor matrimonii*”

Sans conteste, il faut chercher à savoir si les incidences de cette présomption ne comportent pas le risque d’influencer dans une direction prédéfinie, le processus de formation de la certitude morale judiciaire dans la déclaration de nullité du mariage canonique. A la suite du pape PIE XII⁶⁹, la réponse se formalise d’après les termes du canon 1608, §4: «*Iudex qui eam certitudinem adipisci non potuit, pronuntiet non constare de iure actoris et conventum absolutum dimittat, nisi agatur de causa iuris favore fruente, quo in casu pro ipsa pronuntiandum est*» (art. 247, §5, DC). En l’absence de certitude morale, le juge doit trancher en faveur du défendeur. Toutefois, dans certaines causes, le droit peut indiquer d’autre préférence à suivre⁷⁰. Dans le cadre du procès matrimonial, le mariage contracté entre personnes juridiquement habiles (c. 1057, §1) jouit de la faveur du droit (c. 1060), par conséquent en l’absence de certitude morale, le juge devra décider en faveur de sa validité selon les termes des dispositions énoncées. Le canon 1608, §4 ne fait aucune allusion à la certitude probable. Il traite des éventualités devant lesquelles on se heurte à l’impossibilité d’atteindre l’état de certitude morale. Cette nuance est à percevoir en lien avec le paragraphe premier dudit canon⁷¹. Pourtant, la source juridique de la

⁶⁷ Cf. M. J. ARROBA CONDE, “Funzione veritativa delle norme sulla prova”, dans G. DALLA TORRE, et al. (eds.), *Veritas non auctoritas facit legem* (Studi Giuridici 99), Città del Vaticano, LEV, 2012, 71.

⁶⁸ Cf. G. DALLA TORRE, “Le presunzioni legali nel matrimonio: il *favor matrimonii*”, dans ARCISODALIZIO DELLA CURIA ROMANA (ed.), *Presunzioni e matrimonio* (Studi Giuridici 98), Città del Vaticano, LEV, 2011, 117.

⁶⁹ Cf. PIUS XII, Allocutio, 3 octobris 1941, 425, n. 3.

⁷⁰ J. WERCKMEISTER, *Petit dictionnaire de Droit Canonique*, Paris, Cerf, 2011, 104.

⁷¹ Il importe de relever l’opinion de GROCHOLEWSKI, quant au rapport entre les paragraphes 1 et 4 du canon 1608, qu’il trouve de formulation imparfaite. Selon lui, le paragraphe 1 établit que: «*Ad prononuntiationem cuiuslibet sententiæ requiritur in iudicis animo moralis certitudo circa rem sententia definiendam*». L’imprécision de cette formulation viendrait du mot *cuiuslibet sententiæ*. Il n’est pas vrai que pour prononcer une “quelconque sentence” le juge

favor matrimonii dans la formation de la certitude morale quant à la *quæstio facti* est strictement liée à celle du canon 1060⁷². En droit matrimonial, la *favor iuris* traduit: «l'inclination constante du législateur à accorder une protection spéciale à l'institution matrimoniale avant et après sa constitution. Il manifeste cette volonté légale de protéger l'indissolubilité et la stabilité de tout lien conjugal normalement constitué, et ce, du fait de son caractère sacramentel entre baptisés»⁷³. Promue par le législateur pour faire face à l'éventualité du manque de certitude morale dans l'évaluation d'une cause matrimoniale, la *favor iuris*, qui dans ce cadre précis prend la connotation de *favor matrimonii* et de *favor indissolubilitatis*, n'agit qu'en qualité de présomption⁷⁴ de validité du lien conjugal. Autrement dit, les juges dans leur évaluation d'une cause donnée, lui accordent le bénéfice favorable de la validité jusqu'à ce que le contraire soit prouvé *ex actis et probatis*.

Le canon 1584 définit la notion de présomption comme «la conjecture [ou une hypothèse] probable d'une chose incertaine» (art. 214, *DC*). Dans le procès matrimonial, cette conjecture est la validité du mariage en proie à quelques doutes. C'est autour de cette hypothèse établie par le législateur, que se définit l'esprit dans lequel se déroule le procès matrimonial canonique qui est une évaluation du lien légitimement contracté⁷⁵. En ligne de principe, dans la sphère judiciaire matrimoniale au for canonique, l'on admet une présomption: la *favor matrimonii*. À l'origine de celle-ci, nous avons le *ius connubii* qui porte en avant le droit divin et «naturel de tout être humain au mariage. Il ne peut être limité que pour des raisons graves et justes. Et

doive avoir la certitude morale; celui-ci doit l'avoir seulement pour prononcer une sentence qui donne raison à l'acteur, c'est-à-dire qui lui reconnaît le droit revendiqué par lui et uniquement en tant qu'il le reconnaît. Non pareillement pour prononcer une sentence négative contre l'acteur (Z. GROCHOLEWSKI, "La certezza morale come chiave di lettura delle norme processuali", 418-419). Toutefois à l'encontre de cet avis, une sentence qu'elle résulte positive ou négative en rapport avec la *petitio iudicialis*, émane toujours d'un jugement moralement certain.

⁷² Cf. G. DALLA TORRE, "Le presunzioni legali nel matrimonio", 118.

⁷³ L. SABBARESE, *Il matrimonio canonico nell'ordine della natura e della grazia, Commento al Codice di Diritto Canonico, Libro IV, Parte I, Titolo VII*, 4^{ème} éd., Urbaniana University Press, Città del Vaticano 2011, 145.

⁷⁴ Il s'agit d'une supposition à partir d'indices non probants. La présomption légale autrement appelée présomption *iuris* est celle fixée par la loi elle-même par opposition à la présomption *hominis* qui est une conjecture faite par le juge. Il existe en outre à côté de ces deux formes une présomption *iuris tantum* et une autre *iuris et iure*. La première est une simple présomption, susceptible d'être mise en échec par une preuve contraire, la seconde est une présomption absolue, irréfutable : Cf. J. WERCKMEISTER, *Petit dictionnaire de Droit Canonique*, 164-165.

⁷⁵ Cf. A. STANKIEWICZ, "Le presunzioni nel processo canonico: la disciplina", dans ARCISODALIZIO DELLA CURIA ROMANA (ed.), *Presunzioni e matrimonio* (Studi Giuridici 98), 137-138.

l'interprétation de ces lois limitatives est stricte. De sorte qu'en cas de doute, seul le droit de contracter mariage doit prévaloir »⁷⁶.

L'intérêt de la *favor matrimonii* dans la formation de la certitude morale consiste à maintenir dans l'esprit du juge la présence de deux entités : d'une part, le principe de la validité du mariage auquel tout le monde a droit à moins d'un empêchement légal (c. 1058), autrement dit, de son indissolubilité et d'autre part, celui de la *favor veritatis* vers lequel est orienté le procès. Ces deux principes subsistent dans l'esprit du juge à l'heure de l'épreuve de la certitude morale, sans que la présomption de validité matrimoniale ne s'ajuste à la vérité des faits en cause. Thomas Sanchez (1550-1610) le dira avec plus d'éloquence : « *Ita est matrimonii favor irritum dissolvere, ac validum tueri* »⁷⁷. De toute façon, la relation entre la faveur du mariage et le principe universel de vérité à découvrir est plutôt de nature complémentaire. La vérité est au service de l'institution matrimoniale qu'elle défend, de sorte que la présomption de la *favor matrimonii* devienne aisément celle de la *veritas matrimonii*⁷⁸.

En aucun cas donc, la *favor iuris* en sa formulation de *favor matrimonii* ou encore de *favor indissolubilitatis* ne se pose comme une contrainte aux juges ecclésiastiques, les conditionnant dans leurs démarches appréciatives. Il ne s'agit que de simples hypothèses légales au bénéfice de la protection de la validité sacramentelle du lien matrimonial qui est mis en question dans le procès. Elle n'annihile pas la nature intrinsèque de la certitude morale qui demeure une appréciation objective des éléments d'une cause par le juge.

5.2.2 — L' "*æstimatio probationum*"

La question de l'*æstimatio probationum* est le présupposé fondamental duquel se déduit la délibération judiciaire. L'exigence de la certitude morale à ce niveau fait appel d'un côté à la discrétion⁷⁹ du juge quant à la certification de la valeur des preuves versées en la cause; et de l'autre, à la formation de sa conviction personnelle ou de son discernement *secundum sua conscientia libera* à l'issue de sa tâche de certification en excluant l'éventualité des doutes raisonnables. Ainsi observe-t-on dans l'activité évaluative un critère

⁷⁶ J. HERVADA, "Commentaire du can. 1058", dans CDCA3, 918.

⁷⁷ T. SANCHEZ, *Disputationum de sancto matrimonii sacramento*, vol. II, lib. 7, disp. 100, n. 14, 363.

⁷⁸ Cf. P. A. BONNET, "Le prove (art. 155-216)", dans P. A. BONNET et C. GULLO (eds.), *Il giudizio di nullità matrimoniale dopo l'istruzione "Dignitas Connubii"* (Studi Giuridici 77), 261-263; J. LLOBELL, *I processi matrimoniali nella Chiesa*, Roma, Edizione dell'Università della Santa Croce, 2015, 72-76.

⁷⁹ Cf. T. GIUSSANI, *Discrezionalità del giudice nella valutazione delle prove*, Città del Vaticano, Typis Polyglottis Vaticanis, 1977, 128-129.

objectif et un critère subjectif. A l'encontre de ces deux critères, le pape BENOÎT XVI avertit déjà sur les dangers du formalisme légaliste excessif et du subjectivisme arbitraire⁸⁰.

Le premier critère nous conduit au concept de preuve. Par définition, la preuve judiciaire est une «*rei dubiae seu controversiae per legitima argumenta iudici facta ostensio, sive actus iudicialis, quo per argumenta idonea in forma legitima proposita de re dubia et controversia iudici fit fides*»⁸¹; elle est un élément dont l'ensemble oriente vers une position donnée dans la recherche de la vérité. Éprouver un fait indique l'activité de l'esprit qui consiste à cerner l'opportunité, la véracité et la pertinence de ce fait⁸². Dans le procès canonique, la preuve a non seulement comme fonction intrinsèque l'élimination du doute dans l'appréciation de la cause, mais elle sert aussi à éprouver la qualité du jugement qui émane de la décision de justice. À la vérité, il est indubitable que les preuves déteignent toujours sur la nature du jugement à émettre. C'est la raison pour laquelle il existe un rapport de finalité entre preuve et jugement: la preuve porte au jugement et conjointement en détermine la qualité⁸³. Dans leur matérialité, au cœur des dynamiques processuelles propres à l'ordonnancement canonique, les preuves judiciaires adviennent sous la forme de documents publics civils ou ecclésiastiques, lettres testimoniales, de confessions judiciaires ou extrajudiciaires, de témoignages enregistrés ou encore de documents scientifiques⁸⁴.

⁸⁰ Cf. BENEDICTUS XVI, Allocutio ad Sacrae Rotae Romanae Tribunal, Occasione inaugurationis anni iudicialis, 22 ianuarii 2012, dans AAS, 104 (2012), 103-107.

⁸¹ X. WERNZ et P. VIDAL, *Ius canonicum, De processibus*, vol. 4, 390-391. L'on pourra également consulter J. MASCARDUS, *Conclusiones probationum omnium quae in utroque iure quotidie versatur*, vol. 1, Venetiis 1584, q. 2, n. 17, f. 3V.

⁸² Cf. A. STANKIEWICZ, "Le caratteristiche del sistema probatorio canonico", dans *Ap*, 67 (1994), 98.

⁸³ Cf. T. GIUSSANI, *Discrezionalità del giudice nella valutazione delle prove*, Dissertatio ad lauream in facultate Iuris Canonici apud Pontificiam Universitatem a S. Thoma, Typis Polyglottis Vaticanis, Città del vaticano 1977, 68-69.

⁸⁴ Sur ce point, une lecture attentive du canon 1527, §1, nous fait percevoir que ce catalogue n'est pas exhaustif et que *probationes cuiuslibet generis, quae ad causam cognoscendam utiles videantur et sint licitae, adduci possunt*. Autrement dit, tous les moyens pouvant constituer une preuve devraient être plausiblement admis. Toutefois, un problème existe. Car, le même code ne nous spécifie pas exactement les conditions d'inadmissibilité de certains genres de preuves. Puisque dans la *praxis iudicialis canonica*, il est arrivé des situations dans lesquelles certains supports de justifications qualifiés d'extravagants, tels les enregistrements vidéo, les dépositions préenregistrées, les séquences téléphoniques ou encore les lettres à caractère privé pouvant être soumis à la possibilité de falsification, ont été rejetés; tandis que les photographies, échographies ou radiographies sont admises. Alors que recouvre donc le contenu du terme «*licite*» employé au can. 1527? La doctrine et la jurisprudence de la Rote nous en donnent plus de détails à ce sujet: cfr. J. LLOBELL,

Le pas fondamental dans l'*æstimatio probationum* en vue de la certitude morale consiste en une certification rationnelle non seulement des moyens et des sujets par lesquels adviennent les preuves, mais aussi de leur substance intrinsèque⁸⁵. Elle nous réfère au canon 1572 qui fait appel à quatre critères incontournables pour l'exercice de cette tâche. Le premier, celui de la probité, s'appuie sur la qualité du témoin et sur l'honorabilité de ses mœurs. Le second, le critère de connaissance vérifie la source d'information du témoin s'agissant d'une donnée importante pour apprécier son témoignage. Une grande différence existe entre connaître les faits directement d'après son opinion personnelle, pour les avoir perçus avec ses propres sens, et n'en avoir connaissance qu'indirectement, par références, par rumeurs ou suppositions. Le troisième critère est celui de la crédibilité du témoin, pour apprécier la cohérence et la valeur des faits rapportés. Un témoin est cohérent avec lui-même s'il suit dans ses dires, le cours correct des événements par l'exactitude des circonstances essentielles, la certitude de ce qu'il raconte, l'enchaînement causal des faits sans contradiction ni incongruité. Le témoin hésitant ou imprécis est celui qui s'exprime sans fermeté, sans assurance, en doutant de ses affirmations. Enfin, le quatrième critère est celui de la conformité dans les déclarations⁸⁶.

La démarche suivante se résume au mouvement intérieur de la conscience intellectuelle libre dans sa tentative de rejoindre la vérité des preuves alléguées en la cause. Cette tâche est essentiellement « un discernement ou encore un jugement de valeur de nature canonique à porter sur les faits mis en exergue dans la preuve en relation avec le fait à prouver lors du jugement »⁸⁷. Cet exercice se déroule en toute liberté. Le juge, bien que tenu de suivre des lignes indicatives formelles prescrites dans la procédure judiciaire, demeure fondamentalement libre à l'égard de toutes contraintes dans l'exécution de sa tâche. À l'inverse, il doit veiller au risque de l'arbitraire. Par ailleurs, son évaluation ne doit pas être soumise aux préjugés de sa propre conscience. Elle doit plutôt s'en tenir à l'objectivité de la réalité des faits à travers une recherche équilibrée de la vérité des événements. Pour cela, la tâche d'*estimatio* des preuves requiert chez le juge un équilibre

“Oggettività e soggettività nella valutazione giudiziaria delle prove”, dans *QDE*, 14 (2001), 394-413; c. DE LANVERSIN, Decretum diei 18 decembris 1986, dans *RRT Decr*, 4 (1998), 180, n. 7; c. STANKIEWICZ, Decretum 27 maii 1994, dans *RRT Decr*, 12 (2007), 117, n. 2; c. DORAN, Decretum 27 iunii 1991, dans *RRT Decr*, 9 (2003), 86, n. 7; c. RAGNI, Decretum 19 octobris 1993, dans *RRT Decr*, 9 (2005), 170, n. 16.

⁸⁵ Cf. D. VICARI, *La certezza morale nell'attività giudiziale*, 92-156.

⁸⁶ Cf. L. DEL AMO et J. CALVO, “Commentaire au can. 1572”, dans *CDCA3*, 1389-1390.

⁸⁷ A. STANKIEWICZ, “Le caratteristiche del sistema probatorio canonico”, 93.

psychologique, la maturité humaine, une certaine rectitude et une impartialité à toute épreuve⁸⁸.

Parfois les matières à discernement ne sont rendues possibles qu'en disposant d'un nombre suffisant de preuves en vue d'une vérité plus objective. Il pourrait se déduire alors l'importance du cumul d'éléments pour atteindre l'idéal de l'objectivité juridique⁸⁹. Cela n'est cependant pas un critère absolu, puisqu'en certaines éventualités, un seul élément de preuve peut totalement suffire à faire foi selon l'adage «*quæ non prosunt singula, multa iuvant*»⁹⁰. C'est la raison pour laquelle la maxime processuelle: «*unus testis, nullus testis*» ne se vérifie pas toujours⁹¹.

6 — La certitude morale dans la MIDI et ses implications dans le processus brevior

L'une des caractéristiques du *processus brevior*, désormais admise dans l'ordonnancement canonique actuel sur l'initiative du Pape François à travers la MIDI est l'intervention directe de l'évêque diocésain⁹² (*iudex natus et primus inter iudices*) dans la définition d'une cause matrimoniale traitée par voie judiciaire⁹³. Dans ce domaine, son devoir d'administration de la justice

⁸⁸ Cf. P. FELICI, "Indagine psicologica e cause matrimoniali", dans *Comm*, 5 (1973), 106.

⁸⁹ Cf. IDEM, "Formalitates iuridicæ et æstimatio probationum in processu canonico", dans *Comm*, 9 (1977), 178.

⁹⁰ M. AGOSTO, *Il matrimonio canonico, Guida alla scrittura giurisprudenziale in latino*, 142.

⁹¹ Cf. S. BERLINGO, "La prova di coscienza nelle cause canoniche di nullità del matrimonio", dans G. DALLA TORRE, et al. (eds.), *Veritas non auctoritas facit legem* (Studi Giuridici 99), 125-136.

⁹² Parce qu'autres changements importants apportés par la *Mitis Iudex* sont entre autres les nouvelles règles de compétence, le fait qu'il est maintenant possible de constituer un tribunal avec un clerc comme président et deux laïcs comme juges adjoints, les nouvelles règles de preuve et le fait qu'il n'y ait plus la deuxième instance obligatoire...etc.: F. COCCOPLAMERIO, "Aula Sanctae Sedis Diurnarii edocendis (relatio)", dans *Comm*, 47 (2015), 409-414.

⁹³ Cf. M. MINGARDI, "Il ruolo del Vescovo diocesano", dans *La riforma dei processi matrimoniali di Papa Francesco*, Milano, Ancora, 2016, 91-105; L. SABBARESE, "Il Vescovo giudice nel processo più breve", dans P. PALUMBO (ed.), *Le sfide delle famiglie tra diritto e misericordia, confronti ad un anno dalla riforma del processo di nullità matrimoniale nello spirito dell'Amoris Laetitia*, Torino, G. Giappichelli Editore, 2017, 93-111; F. ENGELBERT, "Juges ou faire juger: l'Évêque diocésain juge dans le procès plus bref et le nouveau rôle du vicaire judiciaire à la lumière du m.p. *Mitis Iudex Dominus Iesus*", dans *RDC*, 67, 1 (2017), 121-138. Dans cette dernière contribution, l'auteur a essayé de se poser la question de savoir si la *mitis iudex* mettait en avant une responsabilité figurative de l'Évêque diocésain dans la dynamique de la déclaration de la nullité émanant du procès en forme plus brève, contre celle assez prévalent du vicaire judiciaire, ou s'il s'agissait carrément du

est à quelques exceptions près suivant l'évolution processuelle de la cause, identique à celui du Vicaire judiciaire à qui il a délégué ses pouvoirs. Le fondement de l'action de l'Évêque diocésain dans le *processus brevior* se situe non seulement dans la perspective de la sollicitude pastorale en faveur du salut des âmes *suprema lex*, mais aussi dans une dynamique de conservation d'intégrité de la doctrine de l'Église sur le mariage devant les risques que comporterait le besoin de définir avec célérité des causes matrimoniales à partir de la certitude de leur récupération improbable⁹⁴. Les allusions à la nature de cette certitude (qui reste encore à définir) peuvent apparaître de prime abord comme un élément novateur, en induisant à penser à une propagande plausible faite à la *favor nullitatis* déjà en début de la célébration de ce type de procès. Mais à la vérité il n'en est rien, la nouvelle vision du procès en forme très brève devant l'Évêque n'exonérant pas des pratiques traditionnelles de la vérification ou de l'enquête pré-judiciaire, comme il est de coutume dans les contentieux ordinaires. L'un des mérites de la *MIDI* réside donc dans le fait que les précautions pré-judiciaires au stade introductif du procès ont désormais une allure législative.

6.1 — La compréhension du nouveau canon 1675, *MIDI*

À l'article 12 des Règles de Procédure pour traiter les Cas de Nullité Matrimoniale (=RPCNM) annexes à la *MIDI*, il est stipulé que: «*Ad certitudinem moralem iure necessariam, non sufficit praevalens probationum*

processus inverse, à savoir la concession d'une responsabilité de premier plan à l'évêque diocésain au détriment de celle du vicaire judiciaire. En conclusion de son analyse, il faut retenir que l'évêque assume une responsabilité et une participation effective dans le déroulement du *processus brevior*.

⁹⁴ Cf. *Mitis Iudex*: can. 1683: «*Ipsi Episcopo dioecesano competit iudicare causas de matrimonii nullitate processu brevioris quoties: 1° petitio ab utroque coniuge vel ab alterutro, altero consentiente, proponatur; 2° recurrant rerum personarumque adiuncta, testimoniis vel instrumentis suffulta, quae accuratorem disquisitionem aut investigationem non exigant, et nullitatem manifestam reddant*». Inutile de redire que cette norme s'établit sur l'impulsion réformatrice qui est celle du « grand nombre de fidèles qui souhaitent être en paix avec leur conscience, mais sont trop souvent éloignés des structures juridiques de l'Église à cause de la distance physique ou morale; c'est pourquoi la charité et la miséricorde exigent que cette même Église, en tant que mère, devienne plus proche des enfants qui se considèrent comme séparés » (cfr. L'introduction au m.p. *MIDI*). La présence de l'Évêque dans cette dynamique est pour prévenir les éventuels risques de voir l'Église s'éloigner du principe de l'indissolubilité de mariage, à travers une promotion implicite d'une *favor nullitatis*. « Il ne Nous a toutefois pas échappé qu'une procédure raccourcie peut mettre en danger le principe de l'indissolubilité du mariage; c'est précisément pourquoi Nous avons voulu que dans un tel procès le juge soit l'évêque lui-même, qui, en vertu de sa charge pastorale est avec Pierre le plus grand garant de l'unité dans la foi catholique et la discipline » (cf. L'introduction au m.p. *MIDI*, n. IV).

indiciorumque momentum, sed requiritur ut quodlibet quidem prudens dubium positivum errandi, in iure et in facto, excludatur, etsi mera contrarii possibilitas non tollatur»⁹⁵. La compréhension de cette disposition présuppose fondamentalement l'adhésion aux interprétations du canon 1608, *CIC* et de l'article 247, *DC*, qui sont encore d'actualité dans le contentieux ordinaire canonique. Seulement le problème posé est de considérer les implications de cet article 12 dans le contexte du *processus brevior*, qui, pour être enclenché, exige du juge une démarche préliminaire d'évaluation de la consistance et de la recevabilité du cas au terme des enquêtes pré-judiciaires, tel qu'en témoigne le nouveau canon 1675. Ainsi pour cerner la question de la certitude morale dans la *MIDI* faut-il préalablement que nos réflexions soient centrées sur les teneurs du canon 1675.

De fait la *MIDI* en son canon 1675 dispose que: «*Iudex, antequam causam acceptet, certior fieri debet matrimonium irreparabiliter pessum ivisse, ita ut coniugalis convictus restituere nequeat*»⁹⁶. Ce qui veut dire en clair que la célébration effective des procès en forme très brève est subordonnée à l'existence d'un *fumus processualis* ou *fumus boni iuris* (c'est-à-dire l'existence d'une raison valable) qui serait ici la certitude de l'impossibilité de rétablir le lien matrimonial. En nous limitant strictement à l'interprétation de cette nouvelle norme de procédure, l'inquiétude majeure pourrait porter sur l'identification ou la nature intrinsèque du type de certitude auquel le législateur fait référence (rien qu'à en juger par l'usage du superlatif "*certior*"). En effet qu'elle est sa qualification juridique? De plus, le législateur, par l'usage du mot "*irreparabiliter*" faisait-il allusion au divorce civil des conjoints, consacrant l'infortune du contrat matrimonial civil? Si oui, alors devrions-nous penser à une préoccupation de nature doctrinale quand nous avons conscience de l'importance très accessoire que revêt la considération du divorce civil devant l'indissolubilité du mariage sacramentel. Ne serait-ce donc pas une façon implicite d'accorder du crédit à cette institution civile, évoluant ainsi à contre-courant de l'attitude que l'Église catholique a adoptée jusque-là dans son Magistère?

⁹⁵ La traduction française donne ceci: « Pour atteindre la certitude morale exigée par la loi, l'importance prépondérante des preuves et des indices ne suffit pas mais il est requis que soit exclu tout doute prudent positif de se tromper en droit ou en fait, même si la pure possibilité du contraire n'est pas éliminée ».

⁹⁶ Le procès plus bref *coram episcopo* exige avant la litiscontestation la présence de témoignages ou d'instruments (c. 1683, 2°), à partir desquels le Vicaire judiciaire décidera si les circonstances rendant manifeste une nullité se vérifient afin de mettre en route le *processus brevior*. Il faut remarquer que cette nouvelle norme s'oppose radicalement au canon 1529 qui stipule ceci : « *Iudex ad probationes coligendas ne procedat ante litis contestationem nisi ob gravem causam* ». Cf. P. HUBERT, "Ad certitudinem moralem iure necessariam... La question des preuves à la lumière du motu proprio *Mitis iudex Dominus Iesus*", dans *RDC*, 67, 1 (2017), 107-119.

Sur la question de la nature de la certitude dont traite le canon 1675 de la *MIDI*, il convient de prime abord de cerner les allusions auxquelles le législateur veut faire référence. De fait pour nous, il s'agirait d'une part du divorce civil en rapport à la nature contractuelle du mariage et de l'autre, du retour impossible à la vie conjugale entre les conjoints après avoir eu recours à tous les moyens pastoraux possibles de conciliation, ainsi que des éventuelles preuves pouvant résulter de l'enquête pré-judiciaire ayant pour but de recueillir les éléments qui pourraient s'avérer utiles à mettre en marche le procès plus bref. Les allusions au divorce civil nous font immédiatement pencher en faveur d'une certitude de type légal⁹⁷ qui dans le fond, pourrait également revêtir les allures d'une certitude absolue. La référence à la certitude légale, pour qualifier la nature de la certitude dont il s'agit au nouveau canon 1675, repose uniquement sur les conséquences factuelles objectives et subjectives dérivant de la décision judiciaire qui est celle du divorce prononcé au for civil. Ce type de certitude en rapport avec la qualité de l'acte juridique en question met en exergue la stabilité de la décision dans le système judiciaire civil⁹⁸. Toutefois l'obligation pour le juge d'atteindre un tel état de certitude en amont du *processus brevior* ne conditionne absolument pas le jugement final en faveur de la nullité du mariage. Il s'agit plus d'un accord de base autour de situations juridiques objectives, que d'une conviction intérieure résultant d'une évaluation méticuleuse des actes et des preuves versés en la cause. Il ne produit donc aucune incidence sur la décision finale, qui elle, pour se former, émergera de la certitude morale comme il est d'usage dans le contentieux ordinaire devant le for canonique.

Les allusions à la certitude absolue se situent également dans le même ordre d'idées. Il est notoire que la certitude absolue n'entre pas dans le champ de la certitude morale canonique, d'ailleurs comme le précisait le Pape Pie XII, c'est un état de conviction qui ne devrait pas relever de l'humain, ce dernier étant perfectible. Cependant, il faut atténuer la valeur de cette assertion, devant les logiques qu'impose la vérification des réalités afférentes à l'impossible rétablissement du lien matrimonial pour lequel l'on veut engager le *processus brevior*. En effet, il s'agit d'actes et de circonstances factuelles dont l'objectivité pourrait être attestée sans la moindre probabilité de remise en cause, pourvu que l'enquête pré-judiciaire initiale ait été menée par les personnes idoines et compétentes⁹⁹. A titre exemple, la vérification

⁹⁷ Cf. M. GIANNINI, "Certeza publica", dans *Enciclopedia del Diritto*, vol. 6, 769-792.

⁹⁸ G. KÉMA, *La sentence ecclésiastique dans le système judiciaire canonique*, 55.

⁹⁹ C'est donc dire ici que les éventuelles positions contraires à ce jugement émaneraient des incapacités à mettre au compte des opérateurs de justice dans l'exercice de leur fonction. Cf. A. BAMBERG, "Justice, vérité et miséricorde au risque du mensonge", dans *RDC*, 67, 1 (2017), 180-185.

de l'irréversible rupture d'un mariage devant le for civil est perceptible au moyen de l'acte juridique que représente la grosse de divorce, qui est un document prouvant, par sa propre valeur ce qu'il signifie. C'est dire donc que la certitude absolue trouve sa place dans la vérification du *status* conjugal des conjoints qu'offre l'enquête pré-judiciaire. Ainsi selon le principe contenu au canon 1675, avant d'enclencher le *processus brevior*, le juge doit fonder la valeur de son action non seulement sur l'élément juridique que constitue la grosse¹⁰⁰ du divorce civil mais aussi sur le constat factuel de l'impossibilité irréversible pour les conjoints séparés à reprendre la vie commune.

La référence implicite du constat du divorce civil n'est pas une réalité nouvelle dans la sphère processuelle canonique; elle n'est pas non plus une légitimation de cette pratique qui n'a cours que dans les ordonnancements étatiques, et que jamais l'Église n'admettra car s'érigeant contre le principe de droit divin que constitue l'indissolubilité de l'union sponsale (*Quod ergo Deus coniunxit, homo non separet* — Mc. 10, 9)¹⁰¹. Il faut simplement y comprendre que les procès matrimoniaux canoniques font obligatoirement suite aux procès civils et que l'ordre contraire n'est pas permis sous peine de sanctions des autorités ecclésiastiques dans les pays n'étant pas soumis à un concordat entre le Saint-Siège et les pouvoirs publics civils¹⁰². Cette praxie trouve ses origines

Dans cette contribution, l'auteur fait d'intéressantes observations à ce sujet en mettant en garde contre les risques que les faiblesses de la nature humaine pourraient générer au stade de l'enquête pré-judiciaire. « En effet, l'audition des parties et des témoins par des personnes peu ou pas formées comporte, outre le risque d'aboutir à une sentence nulle, celui de ne pas démasquer le mensonge. (...) l'expérience montre qu'il existe des personnes particulièrement rusées et hypocrites qui tentent de faire passer pour vrai ce qui est faux. (...) Un autre aspect serait que ces personnes menant les enquêtes pré-judiciaires peuvent, surtout si elles sont mal choisies orienter les parties et les conseiller dans le sens de la nullité du mariage. Le risque est alors que le faux ne provienne plus des parties mais de l'institution elle-même » (voir les pages 181-182).

¹⁰⁰ Le contexte d'emploi de cette terminologie est celui des jugements. La notion de « grosse », provient du fait qu'autrefois, rédigée en grosse écriture, contrairement à la minute à savoir le texte original, qui l'était en écriture « menue ».

¹⁰¹ En effet dans les législations civiles, un juge ne prononce un divorce que s'il a « acquis la conviction que la volonté de chacun des époux est réelle et que chacun d'eux a donné librement son accord » (art. 232 du Code civil français). Cette pratique n'est pas admise dans la sphère canonique.

¹⁰² À l'article 247 du Code civil français il est écrit que : « Le tribunal de grande instance statuant en matière civile est seul compétent pour se prononcer sur le divorce et ses conséquences ». La disposition paraît assez claire pour comprendre qu'aucune autre autorité n'a ce pouvoir. Cependant dans les pays où existe le concordat avec le Siège Apostolique, il est possible de par l'institut de la *délibation* de concéder des effets civils au déclaration de nullité de mariage canonique (cf. C. MARINO, *La delibazione delle sentenze ecclesiastiche di nullità matrimoniale nel sistema Italiano di Diritto Internazionale Privato e processuale*, Giuffrè, Milano 2005, 1-9). Nous proposons une liste moins exhaustive des pays ayant cette

dans la révolution française de 1789, qui a consacré la sécularisation du droit, avec la perte du monopole que l'Église avait sur le culte public et la séparation des pouvoirs entre l'Église et l'État¹⁰³. C'est pourquoi bien qu'en n'accordant aucune valeur canonique au divorce civil (c. 1085, §2), l'Église l'admet tout de même au nombre des éléments factuels constituant le point de départ de l'action judiciaire en déclaration de nullité du mariage devant ses instances, autrement elle se retrouverait à enfreindre l'ordre public civil.

Quant à la dynamique de l'irréversible impossibilité de reprendre la vie commune, elle découle également de la compréhension des termes «(...) *matrimonium irreparabiliter pessum ivisse, ita ut coniugalis convictus restitui nequeat*». À vrai dire, ces derniers obligent à considérer plutôt la dimension ontologique et éminemment intérieure du rapport conjugal qui est l'amour, le désir de la communauté de vie (le *consortio coniugalis*). Car, il faut rappeler que le divorce civil ne représente qu'une rupture extrinsèque et objective du contrat matrimonial, qui ne résulte dans bien des cas que d'un commun accord ou d'une entente judiciaire entre les parties en termes de partage des torts. Toutefois rien n'indique que les dimensions intrinsèques de l'amour entre les conjoints ne soient pour autant éteintes. Les possibilités de rapprochements sont toujours possibles même après la rupture formelle du contrat. En fait il est avéré des situations dans lesquelles des conjoints après le divorce civil, ont gardé des liens ensemble en s'établissant dans une sorte d'union libre. Aussi les termes du canon 1675 ne sont pas fortuits. Le juge devrait s'assurer au regard de la requête en nullité du lien matrimonial canonique, qu'il existe plus aucune forme possible de vie matrimoniale entre les conjoints, soit parce qu'ils sont tous les deux engagés de manière stable dans de nouvelles relations matrimoniales ratifiées au for civil, soit qu'après la décision du divorce civil intervenue des années antérieures, les époux, tout en ne s'étant pas remariés, ont simplement mis un terme à toutes possibilités de se revoir. De ce point de vue encore, la qualification de la certitude préalable nécessaire à l'enclenchement du *processus brevior* pourrait être du type absolu, parce qu'il s'agit de données objectivement constatables.

6.2 — La certitude morale dans la *MIDI*: l'article 12, RPCNM

Sur le contenu précis de la certitude morale dans le *m.p. MIDI*, pour mieux nous rendre compte de la mouvance de la doctrine à ce sujet, il est

possibilité: l'Espagne, l'Italie, la Colombie, Malte, La Croatie, la Pologne, la Lituanie, la Slovaquie, le Portugal, la principauté d'Andorre, le Brésil, le Mozambique, le Cap-Vert.

¹⁰³ Cf. E. FOREY, "Le Droit canonique, une discipline juridique?", dans *RDC*, 61, 1 (2011), 43.

opportun de partir d'un tableau synoptique présentant simultanément, d'une part ce qui a eu cours jusque-là dans l'ordonnancement canonique et dont le dernier document d'autorité en la matière reste l'instruction *Dignitas connubii*; de l'autre, les nouvelles normes régissant le *processus brevior*.

Art. 247, DC	Art. 12, RPCNM (MIDI)
<p><i>§1. Ad declarandam nullitatem matrimonii requiritur in iudicis animo moralis certitudo de eiusdem nullitate (cf. can. 1608, §1).</i></p> <p><i>§2. Ad certitudinem autem moralem iure necessariam, non sufficit praevalens probationum indiciorumque momentum, sed requiritur ut quodlibet quidem prudens dubium positivum errandi, in iure et in facto, excludatur, etsi mera contrarii possibilitas non tollatur.</i></p> <p><i>§3. Hanc certitudinem iudex haurire debet ex actis et probatis (can. 1608, §2).</i></p> <p><i>4. Probationes autem aestimare iudex debet ex sua conscientia, firmis praescriptis legis de quarundam probationum efficacia (can. 1608, §3).</i></p> <p><i>§5. Iudex qui hanc certitudinem post diligens causae examen adipisci non potuit, pronuntiet non constare de nullitate matrimonii, firmo art. 248, §5 (can. 1608, §4).</i></p>	<p><i>Ad certitudinem moralem iure necessariam, non sufficit praevalens probationum indiciorumque momentum, sed requiritur ut quodlibet quidem prudens dubium positivum errandi, in iure et in facto, excludatur, etsi mera contrarii possibilitas non tollatur.</i></p> <p>Can. 1687 §1, MIDI: <i>Actis receptis, Episcopus dioecesanus, collatis consiliis cum instructore et assessore, perpensisque animadversionibus defensoris vinculi et, si quae habeantur, defensionibus partium, si moralem certitudinem de matrimonii nullitate adipiscitur, sententiam ferat. Secus causam ad ordinarium tramitem remittat.</i></p>

À la lecture de ce tableau, il se dégage clairement que la perception de la certitude morale dans le *processus brevior* s'établit tout à fait dans la continuité et la constance de ce qui a toujours prévalu dans le système des procès matrimoniaux la canoniques aux lendemains des précisions apportées par la *DC*¹⁰⁴. Aucune nouveauté n'est à observer. La réitération du paragraphe 2 de l'article 247 de *DC* dans le RPCNM de la *MIDI*, tout en indiquant l'essentiel à retenir, est une insistance à bon escient pour indiquer à quel point dans les procès en forme très brève, la logique caractéristique présidant aux décisions judiciaires canoniques reste l'obligation de la certitude morale. Il n'est ni question de certitude absolue ou de certitude légale concernant la nullité du mariage, encore moins de certitude probable.

Pour atteindre l'état de certitude morale nécessaire au jugement dans le *processus brevior*, «le poids majoritaire des preuves et des indices ne suffit pas. Il faut que soit exclu tout doute positif prudent de se tromper, de droit comme de fait, même si cela n'ôte pas la simple possibilité du contraire». Il s'agit pour le juge d'une obligation à être très méticuleux lors de l'évaluation ou de l'appréciation *in iure et in facto* des preuves et des actes intervenus en la cause. Ce qui, de toute évidence, nous ramène aux logiques précédemment énoncées dans le cadre de la formation de la certitude morale de rigueur dans le contentieux ordinaire¹⁰⁵. Nous sommes donc loin de l'incitation à conclure à la nullité des mariages canoniques sur la base de sensibilités relatives à la miséricorde portant à l'affranchissement de personnes en difficulté, simplement parce que l'Église est mère¹⁰⁶. Il ne faut pas se cacher derrière des prétextes pastoraux pour mettre à bas le droit. Bien au contraire, dans le cadre du *processus brevior*, le bon exercice du droit avec la conscience d'agir pour la *veritas et iustitia* intègre pleinement le souci pastoral de la *salus animarum*¹⁰⁷. C'est pourquoi, une attention

¹⁰⁴ Cf. J. LLOBELL, "Alcune questioni comuni ai tre processi per la dichiarazione di nullità del matrimonio previsti dal *m.p. Mitis Iudex*", dans *IE*, 28 (2016), 13-37.

¹⁰⁵ Dans la *MIDI*, à propos de la dynamique évaluative des preuves, il faut faire attention à la nouveauté apparente du canon 1678, §1, au sujet de la valeur des déclarations des parties en cause au cours du procès. Ledit canon rappelle contrairement à la doctrine qui a eu cours jusque-là, qu'elles peuvent avoir valeur de preuve pleine. Toutefois, ce canon, pour nous, fait montre d'une nouveauté en apparence dans la mesure où, la considération ou les allures probatoires d'un élément dépendent toujours du critère de sa crédibilité. Et il s'agit d'un paramètre déjà existant dans la discipline canonique.

¹⁰⁶ On pourra se référer à La célèbre affirmation du Pape Jean-Paul II, selon laquelle «il est faux de croire que pour être plus pastoral le droit doive devenir moins juridique»: IOANNES PAULUS II, Allocutio ad Romanae Rotae Praelatos, auditores, officiales et advocatos anno iudiciali ineute, 18 ianuarii 1990, dans *AAS*, 82 (1990), 874, n. 4; Id., Allocutio ad Romanae Rotae auditores coram admissos, 28 ianuarii 1994, dans *AAS*, 86 (1994), 949, n. 5.

¹⁰⁷ «L'activité juridico-canonique est, *par sa nature même*, pastorale. Elle constitue une participation particulière à la mission du Christ-Pasteur, et elle consiste à mettre en œuvre l'ordre

toute aussi particulière mérite d'être accordée à l'*aestimatio probationum*, qui dans le cadre du *processus brevior*¹⁰⁸ s'applique singulièrement aux confessions judiciaires, aux déclarations des parties (c. 1678, §1), au témoignage unique (c. 1678, §2) ainsi qu'au point de vue des experts pour les cas dépendants du canon 1678, §3.

Il ne faut pas également omettre que dans la dynamique du *processus brevior*, la présomption de droit portant sur la *favor matrimonii* (c. 1060) a encore droit de cité, comme dans le cadre du contentieux ordinaire. En effet, ce n'est pas en se fondant sur la norme du nouveau canon 1675, que la place devrait être faite à une présomption de l'invalidité du lien. Ce n'est pas parce que des ex-conjoints, tiennent en main la grosse de leur divorce advenu 20 années auparavant, ou que ceux-ci soient désormais établis de manière stable en secondes noces que le lien sacramentel issu du premier mariage est nul *ipso iure*. Penser ainsi serait un travers qui précipiterait dans une dynamique promouvant la *favor personae* ou la *favor veritatis subiecti* ou encore plus simplement la *favor nullitatis*. Une réalité contre laquelle avertissait, déjà en 2004, le Pape Jean-Paul II dans son discours à la Rote Romaine¹⁰⁹. Certes le canon 1675 commande de fonder l'enclenchement du procès sur les présupposés de l'irréparable rupture du lien matrimonial. Mais nous savons désormais sous quelle perspective se situe cette norme. Et nous savons aussi que le canon 1060 n'a pas encore été rénové. C'est dire donc que dans les dynamiques d'évaluations des preuves orientant vers la certitude morale, le juge doit toujours avoir

de la justice intra-ecclésiale voulu par le Christ lui-même. À son tour, l'activité pastorale, tout en dépassant de loin les seuls aspects juridiques, comporte toujours une dimension de justice. En effet, il ne serait pas possible de conduire les âmes vers le Royaume des cieux si on ne tenait pas compte de ce minimum de justice et de prudence qui consiste dans l'effort de faire observer fidèlement la loi et les droits de tous dans l'Eglise» : IOANNES PAULUS II, Allocutio, 18 ianuarii 1990, 874, n. 4.

¹⁰⁸ Cf. P. HUBERT, "Ad certitudinem moralem iure necessariam...", 114-118.

¹⁰⁹ « Je fais allusion au *favor iuris* dont jouit le mariage, et à la présomption de validité qui y est liée en cas de doute, déclarée dans le canon 1060 du Code latin et dans le *canon 779 du Code des Canons des Eglises Orientales*. En effet, on entend parfois des voix critiques à son propos. Pour certains, ces principes semblent liés à des situations sociales et culturelles du passé, dans lesquelles la demande de se marier sous une forme canonique présupposait normalement chez les futurs époux la compréhension et l'acceptation de la véritable nature du mariage. Avec la crise qui, dans de nombreux milieux, frappe malheureusement aujourd'hui cette institution, il leur semble que cette validité même du consensus doit souvent être considérée comme compromise, en raison des divers types d'incapacité ou bien en raison de l'exclusion des biens essentiels. Face à cette situation, les détracteurs susmentionnés se demandent s'il ne serait pas plus juste de présumer l'invalidité du mariage contracté plutôt que sa validité. Dans cette perspective, le *favor matrimonii*, affirment ceux-ci, devrait céder la place au *favor personae*, ou au *favor veritatis subiecti*, ou encore au *favor libertatis*» : IOANNES PAULUS II, Allocutio ad Rotam Romanam habita, 29 ianuarii 2004, dans AAS, 96 (2004), 349, n. 2.

présent à l'esprit que « le mariage jouit de la faveur du droit; c'est pourquoi en cas de doute, il faut tenir le mariage pour valide jusqu'à la preuve du contraire ». Le principe de la *favor matrimonii*, dans le *processus brevior* est une garantie d'équilibre d'un procès juste et équitable face au devoir de protection de l'institution matrimoniale. C'est d'ailleurs ce qui justifie encore la présence du Défenseur du lien au cœur dudit procès.

Enfin, le paragraphe 5 du même article 247 de la *DC* reste toujours à valoriser car il insiste sur un aspect normatif assez pertinent des procédures judiciaires: « Le juge qui après un examen diligent de la cause n'a pu acquiescer cette certitude, prononcera que la nullité du mariage n'est pas établie ». Dans le cadre du *processus brevior* notamment, la cause devra être renvoyée à un nouvel examen selon les logiques du contentieux ordinaire selon le canon 1687, §1. Aussi, nombreux sont ceux qui ont tort de penser que promouvoir la célérité des procès canoniques équivaudrait à entrevoir le *processus brevior* comme une panacée au problème des couples recomposés devant le for canonique. L'Église, dans ses options en faveur du salut des âmes, maintient toujours sa lucidité et sa prudence pour respecter son propre Magistère. Le *processus brevior* comme l'indique son nom reste toujours un « procès », et donc une activité dans laquelle la préséance reste accordée à l'exposé et à l'évaluation impartiale des preuves et des actes argués au cours de l'instruction d'une cause¹¹⁰. Cela indique que le souci pastoral pour le salut des âmes ne conditionne en rien l'objectivité des procès canoniques¹¹¹. A cet effet, nous avons l'exemple moins reluisant d'un diocèse qui, en

¹¹⁰ Sur ce point il est intéressant de rappeler un extrait du discours du 22 janvier 1996, du Pape Jean-Paul II à la Rote Romaine: « Mais ce qui domine tout cela, c'est la nature publique du procès en nullité de mariage et en même temps la spécificité juridique de la constatation d'un état, qui est la constatation processuelle d'une réalité objective, c'est-à-dire de l'existence d'un lien valide ou nul. Cette qualification ne peut être obscurcie, dans la procédure effective, par le fait que le procès en nullité s'insère dans un cadre processuel contentieux plus large. En outre, il faut rappeler que les conjoints, auxquels appartient par ailleurs le droit de dénoncer la nullité de leur mariage, n'ont cependant ni le droit à la nullité ni le droit à la validité de celui-ci. Il ne s'agit pas, en réalité, d'engager un procès qui se termine définitivement par une sentence constitutive, mais plutôt de la faculté juridique de proposer à l'autorité compétente de l'Eglise la question de la nullité de leur propre mariage, demandant une décision à cet égard »: IOANNES PAULUS II, *Allocutio ad Romanae Rotae iudices habita*, 22 ianuarii 1996, dans AAS, 88 (1996), 774-775, n. 3. On pourra également consulter à ce propos N. SCHÖCH, « Giustizia e misericordia nella riforma del processo di nullità matrimoniale ordinario », dans P. PALUMBO (ed.), *Le sfide delle famiglie tra diritto e misericordia*, 87-88.

¹¹¹ Et ici il serait pertinent de rappeler l'un des nombreux fondements bibliques de l'impartialité dans le jugement à travers la première lettre de Saint Paul à Timothée pour signifier combien de fois la discipline canonique en s'en tenant à ce principe ne fait pas montre d'une rigidité sans cœur: « Je te conjure devant Dieu, devant Jésus-Christ, et devant les anges élus, d'observer ces choses sans prévention et de ne rien faire par faveur » (1 Tim. 5, 21).

l'espace d'un an a prononcé plus de 80 cas de nullité de mariage selon la forme du procès très bref *coram episcopo*, comme si la voie des contentieux ordinaires était désormais désuète. Il faut prendre garde aux excès dans l'usage de cette ouverture très singulière que le Pape François propose à l'Église entière, parce que d'éventuels abus comporteraient le risque d'une instrumentalisation de la justice ecclésiastique à des fins "d'arrangements" ou de "compromis" entre un juge (en l'occurrence l'Évêque) et des parties. Il ne faut pas oublier que les sentences résultant des jugements canoniques portent remarquablement en tête l'invocation du nom de Dieu (*Au nom du Seigneur, Amen !*) parce que devant être émanées *solum Deum prae oculis habentes*¹¹². En outre, il faut se rappeler que le *processus brevior* reste une procédure extraordinaire, qui en aucun cas, ne devrait emboîter le pas à la procédure ordinaire, au risque de sombrer dans le travers faisant de l'exception, la règle; de l'extraordinaire, la voie ordinaire. Une telle perspective serait tout simplement de l'abus masquant la *mens legislatoris* ayant présidé à la naissance du motu proprio.

Conclusion

La nécessité d'atteindre la certitude morale lors de la délibération judiciaire d'une cause matrimoniale n'est plus à prouver. Cette contribution en insistant sur la substance du concept, sa singularité, son caractère et le processus technique de sa matérialisation dans la formation de la décision de justice, n'a fait que rappeler aux honorables juges ecclésiastiques le devoir et la responsabilité qui sont les leurs dans l'exercice de la fonction qu'ils reçoivent au nom de l'Église.

L'obligation d'atteindre la certitude morale avant de prononcer un jugement en faveur de la nullité d'un mariage canonique est une garantie morale pour la conscience du juge devant le risque de l'arbitraire et des compromis qu'impliquent les jugements expéditifs sous le prétexte d'une pastorale de mauvais aloi. Cette dernière mention, se justifie du fait de la question bien actuelle de nos jours, des divorcés au for civil, désirant se remarier à nouveau, mais littéralement empêchés par le lien précédent contracté au for canonique (c. 1085). Force est de constater que certains juges ecclésiastiques,

¹¹² Cf. G. MONTINI, "L'invocazione del nome di Dio nella sentenza. L'esercizio della giurisdizione matrimoniale nella Chiesa", dans *Periodica*, 92 (2003), 653-706 ; IDEM, "Solum Deum prae oculis habentes. Il significato di una formula", dans G. DALLA TORRE et al. (eds.), *Veritas non auctoritas facit legem* (Studi Giuridici 99), 363-374.

sous le prétexte de la miséricorde pastorale dont l'Église doit témoigner en faveur des personnes en difficultés, ont déjà altéré à maintes reprises leur jugement en favorisant les décisions *pro nullitate* sous le prétexte de libérer des âmes en peine.

À ce sujet le cardinal Jullien rappelle :

celui qui se trompe par témérité quand il devait donner un jugement éclairé, (...) subira certainement un châtement en rapport avec le préjudice qu'il a causé. Il faut s'occuper des choses de Dieu avec beaucoup de circonspection et les yeux grands ouverts, surtout quand (...) sont en jeu des biens et des maux presque infinis. (...) Quelle responsabilité pour le juge ecclésiastique, si par sa faute il déclare libres deux conjoints unis validement devant Dieu; ou si, contre l'ordre voulu par Dieu et par l'Église, il enchaîne l'une à l'autre deux personnes qui, devant Dieu ne sont pas unies entre elles et ont le droit devant l'Église et la société de reprendre leur liberté? La faute de ce juge n'est-elle pas plus grande que celle d'un juge qui condamnerait injustement à la prison ou à une amende ?¹¹³.

C'est la raison pour laquelle, en dépit du jugement rendu sous la forme très brève selon les recommandations de la *MIDI* au regard du cas, l'obligation de la certitude morale pour le juge représente une garantie sur le chemin de la *favor veritatis*, qui est pour lui, celui de sa propre sanctification et de son salut personnel.

¹¹³ A. JULLIEN, *Juges et avocats des tribunaux de l'Église*, Roma, Officium Libri Catholici, 1970, 49-55.

THE RIGHT OF DEFENSE AND DUE PROCESS: *FULCRUM* OF JUSTICE, HEART OF THE LAW

PHILLIP J. BROWN

SUMMARY — This article explores the similarities between the concept of the “right of defense” in canon law and “due process” in the Anglo-American legal tradition, proposing that the essential elements and purposes of the two are essentially the same. It proposes further that they represent the fulcrum upon which the scales of justice function and are the heart of the law, because it is only through assiduous application of the procedures required by the right of defense and due process that just results can be achieved.

RÉSUMÉ — Dans cet article, après avoir souligné les ressemblances entre les concepts de « droit de défense », que l’on retrouve en droit canonique, et d’application régulière de la loi, qui caractérise la tradition juridique anglo-américaine, l’Auteur finit par conclure que les éléments et les objectifs essentiels de l’un et de l’autre sont fondamentalement les mêmes. L’Auteur propose en outre que ces concepts essentiels constituent le pivot sur lequel s’appuie la balance de la justice et le cœur même du droit. Il en est ainsi parce que c’est seulement au prix d’une application assidue des procédures requises par le « droit de défense » et par l’application régulière de la loi que l’on peut obtenir des résultats conformes à la justice.

Introduction

In *The Paper Chase*, a 1973 film about a first-year Harvard Law School student, Contracts Professor Charles W. Kingsfield Jr. says pointedly to his students in his first lecture: “You teach *yourselves* the law. I train your mind. You come in here with a skull full of mush, and if you survive, you’ll leave thinking like a lawyer.” This article has as much to do with how one “thinks like a lawyer,” in this case like a canon lawyer, as it does with abstract principles of canon or civil law.

Canon lawyers and American civil lawyers do not think exactly the same way about procedural rights. There are many reasons for this in our differing

legal traditions. Continental European legal systems are closer to canon law because of their Roman and codal law traditions, so lawyers working in those systems may think more easily like canon lawyers. American legal thinking tends to be more mechanical, whereas canon law is more elastic. This is because canonical thinking tends to be result-oriented, whereas American legal thinking is more process-oriented. At least in part this is because American legal theory today is almost completely positivistic, whereas canon law remains grounded in natural law theory and Roman law traditions. Canadian legal thinking may be something of a hybrid, given the influences on Canadian law of both the British Common Law tradition and continental European systems.

American legal theory often justifies results based on whether required procedures have been followed. On the other hand, canon law is more consistently focused on whether an objectively “right” result has been arrived at, based on principles of natural law. Because *absolute* certainty is not possible, canon law aims at “moral certainty,” relying on the conscience of the decision-maker, rather than on the fool’s errand of presuming that reason alone, employing scientific methods of inquiry and decision making alone, will lead to reliable and just legal conclusions. The British and American approach depends on close attention to the processes of reasoning through which results are arrived at, processes that themselves would be viewed as subject to principles of natural law in canonical thinking. Therefore, process is also very important in canon law: the processes through which information is gathered and through which legal problems are thought through. This fact, in particular, reveals the link between the well-established and indispensable right of defense in canon law and “due process of law” in American law.

The “right of defense” is grounded in natural law theory, whereas “due process of law” is grounded in English legal history and English Common Law, and in the United States in the U.S. Constitution. I would like to address the common recognition in canon and American civil law that *how* legal decisions are made is as important as the decision. If processes are not followed that maximize the possibility of uncovering sufficient proof of a matter and an accurate assessment of the facts, and that provide an adequate opportunity for all involved to present their own view of the facts and the law, one can hardly expect a correct result or a just outcome. For this reason, it can be said that the Right of Defense and Due Process are the fulcrums on which the lever of justice pivots, that they in fact are at the very heart of the law. Furthermore, in canon law, grounded in the Gospel, justice is not only to be tempered by mercy, but mercy is an integral part of the very concept of justice for a Christian. One might therefore say that in canon law the

human heart is the pivot point, the fulcrum of canonical justice. The very pragmatic and technical principles of the right of defense and due process must be protected and fulfilled in concrete terms to arrive at justice tempered by mercy, a justice revealing mercy at its heart. The rights of defense and due process aim to assure that those who will be affected by a legal process are able to participate in it in a meaningful way with respect to ascertaining relevant facts and applying the relevant law to the facts once they have been ascertained.

1 — *Essentials of the Right of Defense*

Coram Wynen and the succeeding jurisprudence of the Apostolic Signatura identify the principal elements of the right of defense, namely, that every party, whether petitioner or respondent, is entitled to exercise and have protected the right of defense in a criminal or other contentious trial, and that he or she has the right to exercise it either personally or through an advocate. This right derives from natural law itself, and while parties do not have to exercise the right, they must be given a meaningful opportunity to do so. As stated in *Coram Wynen*: “one cannot conceive of a trial, that is a judicial debate (*disceptatio iudicialis*), without the presence of due process of law (*contradictorium*), that is the possibility given to each party to defend himself or herself against the assertions and allegations of the other party.”¹ The esteemed jurist Antoni Stankiewicz has also noted the natural law basis of the right and its indispensability in an interlocutory sentence.²

A useful framework for understanding the complexities of the right of defense in canon law can be found in the essential nature of “due process” as it is understood in American law. “Due process” in American law requires that parties to a legal proceeding be notified of the proceeding sufficiently in advance to be able to participate in it in an effective way by presenting and responding to evidence (proofs) offered during the course of the process. They must be notified when and where the proceedings will take place and what will be considered. The parties must be given a meaningful opportunity

¹ TRIBUNAL OF THE ROMAN ROTA, *coram WYNEN*, 9 March 1955, in *RRT Dec*, 47 (1955), 220. See also M. LEGA and V. BARTOCETTI, *Commentarius in iudicia ecclesiastica*, vol. II, Rome, Anonima libreria cattolica italiana, 1950, 900, no. 4, cited and translated by the author in Frans DANEELS, “The Right of Defence,” in *StC*, 27 (1993), 77-95.

² TRIBUNAL OF THE ROMAN ROTA, *coram STANKIEWICZ* (interlocutory sentence), 22 November 1984, in *ME*, 113 (1988), 322.

and sufficient time in advance of the proceedings to gather evidence and prepare arguments of fact and law to present to the tribunal. The stock phrase for this in American law is “notice and opportunity to be heard.” Included are various requirements very similar to those that undergird the essentials of the right of defense in canon law.

Although the right of defense derives from natural law, the Signatura has noted that the nullity of a sentence due to a *denial* of the right of legitimate defense can be of natural law *or* positive law, since concrete expression can only be given to the exercise of the right through procedural dispositions established by positive law. *Coram Di Felice* identifies the stages of a contentious process at which special care must be taken to protect the right of defense:

1. citation of the respondent (c. 1712);
2. formulation of the doubt (c. 1728);
3. interrogation of the parties (c. 1742);
4. proof through witnesses (c. 1754);
5. proof through experts (c. 1792);
6. proof through instruments (c. 1812);
7. publication of the acts/process (cc. 1828-1867); and
8. discussion of the case/arguments (cc. 1858-1867).³

Thus, if essential procedural rights established by positive law are violated, a sentence will suffer nullity deriving from both substantive denial of the natural law right and from the inability to exercise that right concretely through just procedures established by positive law.⁴

By natural law, a process is null when the judicial exchange (*contradictorium*) has been denied a party, since this essentially constitutes a trial. “One cannot conceive of a trial or judicial debate without a judicial exchange, that is, the opportunity given to both parties to defend oneself against the assertions and allegations of the other party....⁵

The right of defence consists of the concrete and practical grant not only of an abstract right or of the mere possibility to defend oneself, but also of the

³ TRIBUNAL OF THE ROMAN ROTA, *coram Di Felice*, 24 April 1982, in *RRT Dec*, 74 (1982), 233.

⁴ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Sentence of the College, 17 January 1987, Prot. No. 15301/83 CG, in *Per*, 77 (1988), 329-359; also found in William L. DANIEL (trans. and ed.), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Montréal, Wilson & LaFleur, 2011 (author’s source), 35-78, at 49 [=DANIEL, *Ministerium Iustitiae*].

⁵ DANIEL, *Ministerium Iustitiae*, 49, citing LEGA-BAROCCEtti, l.c.; A. HANSSEN, “De sanctione nullitatis in processu canonico,” in *Ap*, 11 (1938), 259 ff.

exercise of the right, that is of the possibility of actually exercising one's right of defence.... A grant of the right without the concrete possibility to exercise the right, at least in actuality, is the same as a denial of the right itself.⁶

The right of defense is exercised in a trial by means of a judicial exchange between the parties, "which requires that there be a dialogue; a monologue is not sufficient." Therefore, "it is certain that the citation is absolutely necessary in order to establish or give way to a judicial exchange.... The citation is indeed the beginning of the judicial exchange, but it does not exhaust or fulfill the entirety of a judicial exchange."⁷ The *Signatura* goes on to outline other elements constitutive of the right of defense in concrete terms:

- a. the opportunity to introduce proofs in the trial;
- b. the opportunity to learn about the proofs advanced by the opposing party;
- c. the opportunity to present one's own deductions, allegations and defenses; and
- d. the opportunity to respond, at least once, to the deductions, allegations and defenses of the opposing party.⁸

Coram Burke,⁹ citing *Coram* Davino, states that *contradictorium* is at the very heart of the right of defense. It summarizes the following essential elements of the right:

- a. knowledge of the demands or assertions of the other party [*libellus*];
- b. knowledge of the object of the controversy [*dubium*, that is, a definition of the point at issue, the formulation of the doubt];
- c. knowledge of the proofs presented by the other side [publication of the acts];
- d. the opportunity to present one's own proofs [evidentiary hearing, trial process];
- e. the opportunity to develop one's own arguments based on one's own proofs;
- f. the opportunity to rebut the proofs of the other side [rebuttal]; and
- g. the opportunity to answer the arguments of the other party [rebuttal].¹⁰

⁶ DANIEL, *Ministerium Iustitiae*, 52.

⁷ *Ibid.*, 52-53.

⁸ *Ibid.*, 53.

⁹ TRIBUNAL OF THE ROMAN ROTA, *coram* BURKE, 15 November 1990, English translation of originally unpublished sentence, in *StC*, 25 (1991), 509-517.

¹⁰ *Ibid.*, 510, citing *coram* DAVINO, 15 January 1990, no. 7, in *RRT Dec* 82 (1990) 5-6 (bracketed material mine).

In a 2002 circular letter to the judicial vicars of the Italian regional tribunals, the Signatura highlighted that the right of defense belongs to the essential structure of the judicial process. “One cannot conceive of a fair trial without a judicial exchange (*contradditorio*), that is, the concrete possibility granted to each party in the case to be heard and to be able to know about and challenge the petitions, the proofs and the deductions adopted by the opposing party or *ex officio*.”¹¹ The Signatura goes on to list the following norms of positive law necessary to protect fully the natural law right of defense:

- a. the assistance of advocates (c. 1481);
- b. publication of the acts (c. 1598 §1);
- c. publication of the sentence (cc. 1614-1615); and
- d. indications of ways the sentence can be challenged (c. 1614), including the possibility of approaching the Roman Rota.¹²

2 — Medieval Theories of the Right of Defense

The history of the right of defense in medieval canon law is quite interesting. In “Innocent until Proven Guilty: The Origins of a Legal Maxim,” Kenneth Pennington addresses the origins of the right to a trial and the application of procedural norms aimed at both the appearance and the substance of fairness.¹³ He argues that the very meaning of procedural fairness, what we call “due process of law,” was encapsulated by medieval canonists in the legal maxim, “innocent until proven guilty.” He states:

From Gratian on, the jurists equated divine law and natural law. Consequently, under the influence of Paucapalea, between 1250 and 1300 the jurists began to argue that the judicial process and the norms of procedure were not derived from civil law, but from natural law or from the law of nations, the *ius gentium*. Consequently, the fundamental rules of procedure could not be omitted by princes or judges. The right of a defendant to have his case heard in court was absolute, not contingent.¹⁴

¹¹ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Circular Letter to the Judicial Vicars of the Italian Regional Tribunals, 14 November 2002, in DANIEL, *Ministerium Iustitiae*, 749-754, citing JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, no. 3, in AAS, 81 (1989), 923.

¹² DANIEL, *Ministerium Iustitiae*, 751, citing JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, no. 7.

¹³ KENNETH PENNINGTON, “Innocent until Proven Guilty: The Origins of a Legal Maxim,” in *Jur*, 63 (2003), 106-124 [= PENNINGTON, “Innocent until Proven Guilty”].

¹⁴ *Ibid.*, 114.

Paucapalea proposed a theological and scriptural basis for the *ordo iudiciarius*, that is, the trial process, linking it to the situation of Adam and Eve in the garden. In his commentary on Gratian's *Decretum*, he posited that the Adam and Eve story demonstrates a natural law basis for the right to a trial and particular kinds of procedures. He argues that the *ordo iudiciarius* originated in paradise when Adam pleaded innocent to the Lord's accusation of wrongdoing in Gen. 3:9-12, when the Lord demanded: "Adam *ubi es?*" (It seemed strange to Paucapalea that the omniscient God would have to ask Adam "*ubi es?*"). Adam's response was, "My wife, whom You gave to me, gave [the apple] to me, and I ate it." Adam was claiming that God had entrapped him into committing the offense when God gave him a wife: not "the devil made me do it," but "the wife whom you gave me made me do it." No doubt many women in response would like to ask, "so what has changed since Adam and Eve?" The point that Paucapalea was making is subtle, but it was not lost on later jurists. Even the omniscient God must summon defendants, hear their pleas, and allow them to defend themselves.

Paucapalea also cited Moses' decree that what is considered true must be based on the testimony of two or three witnesses, a basic rule of evidence ever since.¹⁵ He argued that Moses' rule simply confirmed the system of procedure followed by God himself (Deut. 19:15).

Paucapalea's most important point was that if God himself must summon litigants to defend themselves, so must human beings. They must also presume that every defendant is innocent until *proven guilty in court*.¹⁶ Once jurists recognized that procedural norms are of natural law, they had to acknowledge that the right of defense of defendants cannot be ignored. As

¹⁵ A contemporary juridical conundrum, in the era of clerical sexual abuse allegations and the "Me Too" movement, involves many cases of allegations supported by the testimony of a single person. It is the classic "he said, she said", "he said, he said", or "she said, she said" confrontation. Cumulative accusations alleging similar fact patterns and apparent *modus operandi* on the part of alleged perpetrators of wrongful acts seem to have led or be leading decision makers to consider a different standard of proof in these cases for determining the credibility or substantiation of allegations. This is notwithstanding the longstanding principle that prior bad acts, or similar accusations from the past, do not constitute proof of current allegations. Ecclesiastical, and in some instances civil, decision makers today seem more willing to consider multiple allegations of prior wrongful acts from the past as persuasive in determining whether or not an individual committed a subsequent bad act or acts and in imposing consequences on the individual, rather than requiring substantive proof of those allegations according to established juridical standards (including the requirement of corroboration deriving from the cited passage in Deuteronomy).

¹⁶ PENNINGTON, "Innocent until Proven Guilty," 113.

Pennington relates, Johannes Monachus in the fourteenth century summed up the right of defense as follows.

[Monachus] began by asking the question: “could the pope, on the basis of [a particular decretal], proceed against a person if he had not cited him?” Johannes concluded that the pope was only above positive law, not natural law. Since a summons had been established by natural law, the pope could not omit it. [Monachus] argued that no judge, even the pope, could come to a just decision unless the defendant was present in court.... He argued that a summons to court (*citatio*) and a judgment (*sententia*) were integral parts of the judicial process because Genesis 3:9-12 proved that both were necessary [He] formulated an expression of the defendant’s right to a trial and to due process with the following words: a person is presumed innocent until proven guilty (*item quilibet presumitur innocens nisi probetur nocens*) [citing Innocent III’s decretal *Dudum* (X 2.23.16)].¹⁷

Jurists of the *Ius commune*, the medieval European legal system, would be puzzled that we embrace the maxim “innocent until proven guilty” today but still deny people a hearing in some circumstances. For them, the maxim meant that “no one, absolutely no one, can be denied a trial under any circumstances ... and that everyone, absolutely everyone, has the right to conduct a vigorous, thorough defense.”¹⁸ Canonists, following Monachus, in fact coined the proverb, “God must give even the devil his day in court.”¹⁹ Pennington points out that in medieval law the maxim “innocent until proven guilty”:

- a. protected defendants from being coerced to give testimony and
- b. from incriminating themselves.
- c. It granted them the absolute right:
 - i. to be summoned;
 - ii. to have their case heard
 - iii. in an open court;
 - iv. to have legal counsel;
 - v. to have their sentence pronounced publicly; and
 - vi. to present evidence in their defense.²⁰

¹⁷ Ibid., 115. Yet, it is known that, since 1995, there have been cases of priests dismissed from the clerical state by rescript of the Holy See at the behest of their bishops, without their having been cited or given the opportunity to participate in a process or exercise their right of defense. This raises the possibility, at least theoretical, of pleas for *restitutio in integrum* in appropriate cases.

¹⁸ Ibid., 124.

¹⁹ Ibid., 116.

²⁰ Ibid., 124.

3 — Contemporary Bases of the Right of Defense and Due Process

Canon law discovers the right of defense in natural law, whereas American law finds due process in the positive law of English legal history and the U.S. Constitution. In more recent times, both are recognized as having their basis in fundamental human rights and respect for human dignity. In Roman Catholic “personalist” schools of thought, respect for human dignity is the self-evident basis of all human rights. This opens the way to dialogue between natural law thinking and contemporary secularist theories of human rights, such as those embodied in the United Nations Universal Declaration of Human Rights.²¹ Pope John Paul II states in *Redemptor hominis* that, “If human rights are violated ... this is particularly painful and ... represents an incomprehensible manifestation of the struggle against man, which can in no way be reconciled with any programme that describes itself as ‘humanistic’.”²² The eminent canonist Cardinal Zenon Grocholewski states that, “... it is almost superfluous to recall ... that the dignity of the person springs from the very concept of the human person; ... even if the elements of natural law, that are reflected in the vision of the dignity of man in lay thought, are also present in the teaching of the Church, they are so much strengthened and enriched by revelation.”²³ He goes on to say that “the concept of the human

²¹ UNITED NATIONS, Universal Declaration of Human Rights, 10 December 1948, at <http://www.un.org/en/universal-declaration-human-rights>; also found in I. GORDON and Z. GROCHOLEWSKI, *Documenta recentiora circa rem matrimoniale et processuale*, vol. I, Rome, PUG, 1977, 309-329.

²² Zenon Card. GROCHOLEWSKI, “The Basis of the Right of Defence,” in *Forum: A Review of Canon Law and Jurisprudence*, 17 (2006), trans. Annetto Depasquale (ed. and pub. by the Ecclesiastical Tribunal of Malta), 343, fn. 9 [= GROCHOLEWSKI, “The Basis of the Right of Defence”], citing Giorgio FILBECK, *I diritti dell'uomo nell'insegnamento della Chiesa. Da Giovanni XXIII a Giovanni Paolo II*, Vatican City, Pontificia Università della Santa Croce, 2002, 94-111 and 132-153.

²³ See GROCHOLEWSKI, “The Basis of the Right of Defence,” 344, citing JOHN XXIII, *Pacem in terris*: “We accept as the basis the principle that each human being is a person.... He is therefore a holder of rights ... that flow ... from his nature itself.... When, furthermore, we consider man’s personal dignity in the light of divine revelation, then it will appear incomparably greater, since men have been redeemed by the blood of Jesus Christ, and Grace has made them sons and friends of God, and heirs to eternal glory.” Grocholewski also cites the following sources:

Dignitatis humanae, n. 2b: The dignity of the human person “is known both by the revealed word of God and by reason itself.”

PAUL VI, General Audience, 4 September 1968, in *Insegnamenti di Paolo VI*, Tipografia Poliglotta Vaticana, vol. 6 (1968), 886: “The evaluation that the Church makes of man ... is of an incomparable greatness. No anthropology equals that of the Church about the human

person and of its dignity in the Magisterium of the Church ... are at the basis of Canon Law ... [and] form the basis of the right of defense in the Church and determine this right; ... they indicate certain ways which this right has to follow ... as regards the *possibility to have recourse* to the ordinary courts to start procedures or to the hierarchical recourse and the consequent judicial contentious-administrative process ... or as regards the *observance of the relative procedural norms*.”²⁴ As John Paul II observed:

The institutionalization of that instrument of justice which is the trial represents a gradual victory for civilization and for respect of human dignity. The Church herself has contributed to this in no small way through the canonical trial. In so doing, the Church has not denied her mission of love and peace; rather she has merely set up an adequate means for ascertaining the truth which is an indispensable condition for justice enlivened by love, and thus also for true peace.... The fair trial is a right of the faithful and at the same time it is a requirement of the public good of the Church. The profound respect owed to the rights of the human person ... should motivate the ecclesiastical judge to observe exactly those procedural norms which guarantee precisely the rights of the person.²⁵

Conclusion

Arriving at just results begins with collecting information, the evidence relevant to the matter at hand. Just results require sufficient evidence. Care must be taken to gather sufficient evidence, using fair procedures, for justice to be achieved. The *evidence* must be weighed and balanced according to its completeness and relevance and according to fair procedures that allow all parties a meaningful opportunity to present their own evidence and be part of the process of weighing and balancing. Finally, *the law* has to be weighed and balanced for its applicability and how it is to be applied, using fair

person, even considered as an individual, as regards his uniqueness, his dignity, the intangibility and richness of his fundamental rights ...”

JOHN PAUL II, Allocution to the Roman Rota, 17 February 1979, in AAS, 71 (1979), 1364, n. 4b: “The Church has never ceased to proclaim this truth” (trans. Annetto Depasquale).

IDEM, Speech to the University of Uppsala, 9 June 1989, in AAS, 81 (1989), 1364: “It was this [Judeo-Christian] tradition which developed a higher concept of the *human person*, seen as an image of God, redeemed by Christ and called to an eternal destiny, endowed with inalienable rights, and responsible for the common good of society” (trans. Annetto Depasquale).

²⁴ GROCHOLEWSKI, “The Basis of the Right of Defence,” 348.

²⁵ JOHN PAUL II, Allocution to the Roman Rota, 18 January 1990, in AAS, 82 (1990), 876, n. 7b (trans. Annetto Depasquale), in GROCHOLEWSKI, “The Basis of the Right of Defence,” 348.

procedures that involve all the parties, before a decision is arrived at. With facts and law placed on the scales of justice, the fulcrum upon which they must be weighed and balanced is the protection of the right of defense and due process. If so weighed and balanced, just decisions are sure to emerge from the heart of the law, which in canon law is a merciful heart. Thinking through these things carefully and applying them assiduously is how one is to sort through the mush of law and facts one is confronted with when presented with any question that can, should, or must be resolved juridically; it is how one brings clarity and solidity to the mush of our minds, making it possible for us to “think like a lawyer.” So, students of canon law and canonists alike (as should students and practitioners of any legal system), when engaging in the legal, in the canonical enterprise, *think like a lawyer*; *think like a canon lawyer*, and act accordingly. If you do, more often than not, justice will be done.

LE SECRET DES DÉLIBÉRATIONS DU JURY ET DU CONCLAVE

DANIEL CAMIRAND

RÉSUMÉ — S'inscrivant dans une perspective de droit comparé, l'article brosse l'histoire de l'institution du jury et de celle du conclave, deux institutions nées au détour du XIII^e siècle, dans la foulée de la réforme grégorienne. Il s'intéresse particulièrement au développement et au contenu des normes relatives à la claustration des jurés et des électeurs, à l'*incommunicado* et au secret perpétuel des délibérations. La similarité des normes étudiées tient notamment au fait que, dans les deux institutions, elles jouent un rôle semblable. Le secret est intimement lié à la qualité des délibérations, à la préservation du caractère définitif de la décision prise, à la protection contre les ingérences extérieures et à la protection personnelle des jurés et des cardinaux électeurs. Bien que fondamental, on voit que le secret pose certains défis, à l'ère de l'information et de la multiplication des réseaux de communication.

SUMMARY — Written from the perspective of comparative law, the article draws on the history of the institution of the jury and that of the conclave, two institutions born around the 13th century, in the wake of the Gregorian reform. The author is particularly interested in the development and content of the norms relating to the secrecy of jurors and voters, the *incommunicado* and the perpetual secrecy of deliberations. The similarity of the norms studied is due to the fact that, in both institutions, they play a similar role. Secrecy is closely linked to the quality of the deliberations, the preservation of the final character of the decision taken, the protection against outside interference, and the personal protection of jurors and cardinal electors. Although fundamental, we see that the secret poses certain challenges, in this era of information and the multiplication of communication networks.

Introduction

Le conclave comme le jury ont ceci en commun que leurs membres sont soumis à l'*incommunicado*, à la séquestration et au secret perpétuel. Ces

particularités peuvent paraître anachroniques dans une société attachée aux libertés individuelles, à l'« imputabilité » du pouvoir et à la circulation de l'information, quelle qu'elle soit. La similarité de ces règles et le fait qu'elles aient survécu au passage du temps donnent à penser que, loin d'être uniquement le produit des aléas historiques, elles sont une réponse unique — et peut-être nécessaire — à des besoins similaires.

La comparaison de normes permet de mieux comprendre leur fonction, leur fonctionnement et, parfois même, anticiper leur développement. Un tel exercice suppose que les règles comparées aient suffisamment de points communs pour qu'un rapprochement soit possible mais assez de distance pour qu'il y ait apport mutuel. Dans ce cas-ci, nous avons choisi de comparer des institutions — le conclave et le jury — qui n'ont pas la même fonction, qui sont issues de traditions juridiques différentes mais qui, malgré tout, présentent des similarités frappantes en matière de secret des délibérations.

Contrairement au conclave, qui est une institution propre à l'Église, le jury se décline sous plusieurs formes et avec des fonctions différentes selon les traditions juridiques qui l'emploient. Pour des raisons pratiques, nous avons donc choisi de nous intéresser au seul jury criminel. Nous examinerons principalement à la situation canadienne et, par le fait même, la situation britannique dont elle est largement tributaire.

1 — *Le secret des délibérations du jury*

Les juristes anglais ne manquent pas de figures de style pour décrire leur attachement et l'importance qu'ils accordent au jury: « glory of the English law »¹, « palladium of liberty »², « lamp that shows that freedom lives »³, « bulwark of liberty »⁴. De fait, dans les pays de tradition juridique britannique, le jury a joué et continue de jouer un rôle de premier ordre dans la définition même des rapports entre l'État et ses citoyens, en matière de justice. Et comme nous le verrons, ce rôle est intimement lié à la règle du secret des délibérations, aussi appelée *règle de lord Mansfield*.

¹ W. BLACKSTONE, *Commentaries on the Laws of England*, 15^e éd., vol. III, Londres, Cadell and Davies, 1809, 378.

² Ibid., vol. IV, 349 (=BLACKSTONE, *Commentaries*)

³ Lord DEVLIN, *Trial by jury*, Londres, Stevens, 1956, 164 (=DEVLIN, *Trial by Jury*).

⁴ Voir COURT OF APPEAL OF ENGLAND AND WALES, *Ward v. James* [1966] 1 QB 273, motifs de Lord Denning.

1.1 — L'histoire du jury

En *common law*, le jury est généralement composé d'une douzaine de *jurés* qui — comme leur nom l'indique — ont prêté serment de remplir la fonction judiciaire qui leur incombe. Si la norme du jury a fort peu changé depuis l'origine, sa fonction a, quant à elle, passablement évolué.

1.1.1 — *Le verdict à la Judicio dei*

Quand les faits sont clairs, l'issue du procès l'est aussi. Dans les cas difficiles à prouver, notamment à cause de la nature secrète de la faute (la corruption par exemple) ou encore du manque de clarté de la preuve (absence d'aveux, témoignages contradictoires, etc.), il est évidemment plus difficile de trouver une solution judiciaire qui soit reconnue comme certaine. Selon la formule « *Laissons les cas incertains au jugement de Dieu* »⁵, l'ordalie était cette solution qui a prévalu en Europe, du début du Moyen-Âge jusqu'au XIII^e siècle. L'accusé y était soumis à une épreuve physique dont l'issue établissait ou non sa culpabilité. Cette dernière se déclinait en de nombreuses formes dont les deux principales sont celles du feu et de l'eau⁶. Un accusé soumis au *ferrum candens* devait tenir dans sa main ou marcher sur des fers rougis. Une plaie bien cicatrisée, après quelques jours, établissait son innocence ou son bon droit. Il en allait de même dans le cas de l'eau chaude, qui consistait à aller chercher un objet au fond d'un récipient d'eau bouillante. L'ordalie de l'eau était une méthode présentant peu d'issues favorables puisque, plongé dans un cours d'eau, l'accusé se noyait — ce qui établissait qu'il était innocent — ou alors remontait à la surface par quelque sortilège, ce qui prouvait sa culpabilité et entraînait son châtement. Avec la conquête normande, en 1066, le duel judiciaire, deviendra aussi une pratique commune en Angleterre⁷. À ces ordalies s'ajoutait celle du serment⁸ — ou *purgatio canonica* — qui faisait en sorte que celui qui acceptait de jurer de son innocence établissait *ipso facto* son innocence devant les hommes mais, en cas de parjure, prenait le risque de se condamner pour l'éternité. Les ordalies prenaient place dans un lieu de culte, accompagnée d'incantations religieuses et présidée par des clercs, souvent les seuls à pouvoir efficacement administrer le droit.

⁵ Attribuée à Charlemagne. Voir R.H. WHITE, « Origin and Development of Trial by Jury », dans *Tennessee Law Review*, 29 (1961), 9.

⁶ Ibid., 11-12 et R.H. WHITE, « The Origin and Development of Trial by Jury », 163.

⁷ Ibid., 164.

⁸ F. MCAULEY, « Canon Law and the End of the Ordeal », dans *Oxford Journal of Legal Studies*, vol. 26, n° 3 (21 septembre 2006), 485.

À la fin du XI^e siècle, la réforme grégorienne établit clairement la « ligne de démarcation entre le sacré et le profane »⁹ et remet indirectement en question le rôle des clercs en la matière. L'ordalie demeurera toutefois, faute d'alternative. Innocent III remédiera à cette situation en établissant le processus inquisitoire, par une série de décrets publiés entre 1198 et 1212. Il sera dorénavant possible d'instruire une enquête permettant de rechercher des preuves et d'en évaluer la qualité pour éventuellement en venir à une certitude morale. Ainsi privée de l'argument de nécessité comme elle l'avait été de toute légitimité théologique ou juridique¹⁰, la participation des clercs à l'ordalie sera officiellement interdite en 1215, au concile du Latran IV. L'ordalie n'y survivra pas puisqu'elle pouvait difficilement se comprendre et se vivre en dehors de la participation des clercs.

1.1.2 — Le développement du jury

Les conjonctures de l'histoire étant parfois étonnantes, cette même année Jean sans Terre signe la *Magna Carta*. Celle-ci encadre l'arbitraire royal en mettant notamment de l'avant un nouveau concept juridique : celui d'être jugé par ses pairs : « No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land »¹¹. Le concile du Latran IV et la *Magna Carta* paveront ainsi la voie à la mise en place du *Petit Jury*, que nous connaissons encore de nos jours.

À cette époque, l'Angleterre connaissait déjà plusieurs institutions judiciaires composées de plus ou moins 12 citoyens locaux, ayant prêté serment ou juré d'aider le tribunal en rapportant certains faits dont ils avaient la connaissance. La *purgatio canonica*, dont nous avons parlé plus haut pouvait s'accompagner d'une *compurgation*, soit le fait qu'un certain nombre d'hommes de la famille ou du voisinage jurent de la bonne réputation de l'accusé et de leur foi en son innocence¹². Le recours à ce groupe de *jurés* connaîtra un développement particulier, notamment avec les *Assises de Clarendon*, en 1166. Henri II étendra à

⁹ Cf. *ibid.*, 476. Il est question ici du *Dictatus Papae* de Grégoire VII en 1075.

¹⁰ *Ibid.*

¹¹ G.R.C. DAVIS, *Magna Carta*, London, British Museum, 1963, art. 39.

¹² Le nombre de ces personnes pouvait grandement varier mais il semble que la pratique soit généralement de requérir onze ou douze de ces témoins ayant prêté serment. Voir WHITE, « Origin and Development of Trial by Jury », 11. La règle de l'unanimité du jury, que nous connaissons toujours de nos jours, viendrait du fait que les compurgateurs étaient — par définition — unanimes. Voir DEVLIN, *Trial by Jury*, 7 et 48.

tout son royaume l'institution des *assises*, tribunaux ambulants permettant de centraliser le pouvoir royal¹³. Arrivant en étrangers dans les villes et villages, ces juges devaient compter sur les habitants locaux afin de connaître les faits. Dans un premier temps, Henri ordonne que les querelles relatives à la propriété de la terre soient réglées sur la foi de 12 jurés locaux, prêtant serment à l'effet que l'un ou l'autre des parties soit effectivement propriétaire du terrain disputé¹⁴. De plus, il instaure le jury d'accusation : 12 hommes de bonne réputation prêteront serment d'indiquer au juge ceux qui, au sein de leur communauté, devraient faire l'objet d'une accusation de nature criminelle¹⁵.

Après 1215, c'est précisément à ce dernier jury qu'on confiera aussi le rôle d'établir un verdict. En 1351¹⁶, ces deux fonctions du jury se scinderont : le jury d'accusation sera communément appelé *Grand Jury* et le jury de verdict *Petit Jury*. En l'espace de quelques siècles, le rôle des jurés sera ainsi passé de la défense à l'accusation puis au verdict.

1.1.3 — *De la justice de Dieu au jugement du peuple et de Dieu*

Au problème de savoir comment tirer de faits incertains une conclusion certaine, le génie judiciaire du XIII^e siècle offrait deux réponses. La réponse traditionnelle était celle du recours à un fait extraordinaire cautionné par Dieu, en l'occurrence l'ordalie. La solution nouvelle était celle de l'analyse méthodique et logique des faits disponibles. L'Europe continentale optera rapidement pour cette dernière, en recourant à la méthode inquisitoire. Tout en prenant acte de l'interdiction de l'ordalie, l'Angleterre mettra plus de temps à remplacer le paradigme de l'extraordinaire par celui de la logique¹⁷. Si, de nos jours, on se plaît à associer le verdict par jury à un exercice méthodique et rigoureux, à ses débuts il en allait tout autrement. Le verdict était recherché en tant que phénomène plutôt que comme résultat d'un processus. Comme l'écrit lord Devlin : « What was sought was not a rational conclusion but a sign, something akin to the result of the ordeal or to triumph in battle; the process could not be

¹³ Voir R.H. WHITE, « The Origin and Development of Trial by Jury », 164. Jusqu'au début du XII^e siècle, il n'y avait cependant pas de système judiciaire uniforme, la justice étant administrée par les barons et évêques locaux.

¹⁴ Notons que dès le départ, le jury était utilisé dans les procès tant civils que criminels. De nos jours, en dehors de certains cas comme une poursuite en diffamation, un jury n'est plus utilisé dans les causes civiles.

¹⁵ Voir DEVLIN, *Trial by Jury*, 7.

¹⁶ Voir N.T. ELLIFF, « Notes on the Abolition of the English Grand Jury », dans *Journal of Criminal Law and Criminology*, 29 (1938), 3. Le jury d'accusation ne sera aboli en Grande-Bretagne qu'en 1933 ; il survit toujours aux États-Unis.

¹⁷ Voir DEVLIN, *Trial by Jury*, 9.

determined until it was obtained and, once obtained, the methods of obtaining it were thought less important than the fact that it was there »¹⁸. Le fait de savoir si le verdict reposait sur des opinions, des rumeurs ou des faits était secondaire¹⁹. L'enjeu était le respect d'un certain formalisme, impliquant notamment le secret, et participant d'une mise en scène de l'extraordinaire. C'est l'unanimité rapide des 12 qui fera office de sceau quasi-divin. D'où le fait que certains aient appelé un tel verdict *Jugement du peuple et de Dieu*²⁰. À mesure que le paradigme de la raison s'imposera, la qualité du chemin emprunté pour arriver à cette unanimité fera l'objet d'une attention grandissante. Cela se vérifie notamment dans l'évolution de deux règles associées au jury : la séquestration et le secret des délibérations.

1.2 — La séquestration et le secret des délibérations

Très tôt, les juges constatent que l'unanimité du jury doit être stimulée. Ainsi seront établies dès le départ certaines pratiques de nature à hâter le verdict, notamment la séquestration et *l'incommunicado*.

1.2.1 — La séquestration pendant les délibérations

Dès l'origine du *Petit Jury*, les jurés en délibération faisaient l'objet d'une séquestration qui avait toutes les apparences d'un rude emprisonnement : « Suivant le droit d'Angleterre, après qu'il a entendu la preuve sur la question en litige, le jury doit être rassemblé dans un endroit approprié, sans nourriture et boisson, chaleur et lumière, ce que certains livres appellent la séquestration, et sans communication avec quiconque, à l'exception du huissier et encore là seulement s'ils sont d'accord »²¹. Le fait de boire ou de

¹⁸ Et il ajoute, « It is the oracle deprived of the right of being ambiguous. The jury was in its origin as oracular as the ordeal : neither was conceived in reason : the verdict, no more than the result of the ordeal, was open to rational criticism. This immunity has been largely retained and is still an essential characteristic of the system. » DEVLIN, *Trial by Jury*, 14 et 51.

¹⁹ Il faudra attendre le tournant du XVI^e siècle pour que soit établie la règle voulant que le jury base sa décision essentiellement sur la preuve devant le tribunal. L. GRIFFITHS, « The History and Future of the Jury », dans *Cambrian Law Review*, 18 (1987), 6.

²⁰ « C'est aussi ce qui fait dire avec raison que c'est une réponse divine que les jurés donnent ». J.B. SELVES, *Explication de l'origine et du secret du vrai jury, et comparaison avec le jury anglais et le jury français: ouvrage destiné à perfectionner la procédure criminelle*, Paris, Maradan, 1811, 12.

²¹ COUR SUPRÊME DU CANADA, R. c. Pan; R. c. Sawyer, [2001] 2 R.C.S. 344, par. 47 (=R c. Pan ; R. c. Sawyer). Voir aussi A. MUSSON, « Lay Participation : The Paradox of the Jury », dans *Comparative Legal History*, 3 (juillet 2015), 257.

manger constituait une infraction et celle-ci pouvait entraîner des amendes importantes²². Dans de telles circonstances, l'unanimité n'était pas toujours le fruit d'un exercice rationnel mais un état de fait, obtenu dans un contexte de pression importante exercée sur les jurés.

De nos jours, la séquestration du jury pendant les délibérations est toujours en vigueur²³. Celle-ci n'est plus justifiée d'abord par la pression devant être exercée sur les jurés mais plutôt par la prévention de toute influence extérieure²⁴. Ce risque a aussi conduit à la règle de l'*incommunicado*. Pendant le procès, les jurés sont invités à ne pas discuter du déroulement du procès avec des personnes de l'extérieur et à ne pas lire ou obtenir des informations autres que celles obtenues dans la salle d'audience. Dans ses directives au jury, le juge mentionne ce qui suit :

Vous pouvez évidemment saluer poliment les personnes que vous rencontrez au palais de justice, mais ne discutez de l'affaire qu'avec les autres membres du jury. [...] Ne consultez pas d'autres personnes ni d'autres sources d'information, sous forme imprimée ou électronique. [...] Il vous est interdit d'utiliser Internet ou tout autre dispositif électronique dans le cadre de cette affaire de quelque façon que ce soit, ce qui inclut les sites de clavardage, Facebook, MySpace, Twitter, les applications (*Apps*) ou tout autre réseau social électronique. Ni lisez rien ni n'affichez rien au sujet du procès. N'utilisez pas Twitter et n'envoyez pas de messages texte au sujet du procès. Ne discutez pas du procès sur un blogue et ne lisez rien à ce sujet. Ne discutez pas de cette affaire par courriel. Vous devez arriver à une décision dans cette affaire en vous fondant uniquement sur la preuve que vous entendez dans la salle d'audience²⁵.

Pendant la période des délibérations, l'*incommunicado* devient total. Il ne se limite plus aux éléments du procès. Personne ne peut entrer en contact avec les jurés et ceux-ci ne peuvent entrer en contact avec personne, hormis le shériff chargé de leur garde. Le juge peut communiquer avec eux, par note remise par le shériff, afin de s'informer du fait que le jury en est venu ou non à un verdict, qu'il estime possible de le faire dans un temps prévisible ou qu'il rencontre une difficulté particulière pour la suite de ses délibérations²⁶. De la même façon, le jury peut communiquer avec le juge de sa

²² DEVLIN, *Trial by Jury*, 50. En Angleterre, les restrictions concernant la nourriture et le chauffage ne seront formellement abrogées par le *Jury Act* qu'en 1870.

²³ Ibid., art. 647 (1).

²⁴ GOUVERNEMENT DU CANADA, Ministère de la Justice, Comité directeur sur l'efficacité et l'accès en matière de justice, *Rapport sur la réforme du Jury*, 2009, art. 3.5.1.

²⁵ INSTITUT NATIONAL DE LA MAGISTRATURE DU CANADA, *Modèle de directives au jury*, 2011, art. 3.8 (=Modèle de directives au jury).

²⁶ Cf. DEVLIN, *Trial by Jury*, 43.

propre initiative afin de l'informer de l'un ou l'autre de ces éléments ou encore pour demander à voir de nouveau un élément de preuve. Une brèche à l'*incommunicado* peut entraîner l'annulation du procès, pour possible contamination de la preuve²⁷. Ce qui est en jeu est à la fois la qualité de l'information et l'intégrité du processus de délibération. Nous verrons que, de nos jours, la règle du secret perpétuel vise le même objectif.

1.2.2 — *Le secret perpétuel*

Jusqu'à la fin du XVII^e siècle, il était possible pour la couronne de poursuivre les jurés à l'aide d'un *writ of attain*²⁸ si elle estimait que ceux-ci avaient rendu un faux verdict, c'est à dire un verdict différent de celui qu'ils auraient dû rendre en fonction de la preuve présentée. Cette disposition voulait notamment faire obstacle à la corruption des jurés²⁹. Un nouveau jury composé de 24 jurés³⁰ avait alors comme rôle de rejurer la cause et, éventuellement, d'invalider le premier verdict, ceci ouvrait ainsi la porte à une condamnation du premier jury pour *contempt of court*, soit pour outrage au tribunal. Cette possibilité faisait planer un risque sur des jurés qui retournaient un verdict différent de celui qui était clairement attendu du pouvoir judiciaire ou civil³¹. C'est donc dire que les jurés, après le procès, pouvaient être appelés à témoigner du déroulement de leurs délibérations, voire ainsi à s'incriminer eux-mêmes. À l'origine, le secret des délibérations ne s'appliquait que pendant le procès lui-même³².

Donc en 1670, un jury acquitte deux Quakers de participation à une assemblée illégale et ce, en dépit de la preuve incriminante présentée. Cela entraînera la condamnation des jurés parmi lesquels figure un certain Bushel. En appel de cette condamnation, Sir Vaughan prononce un verdict d'acquiescement, estimant qu'il est impossible de juger de l'extérieur le cheminement ayant conduit à la décision du jury³³. Le *Bushel's case* fera jurisprudence en tant que le jury sera dorénavant reconnu comme institution pleinement libre de ses décisions. Ce jugement ouvrira la porte au concept de *jury nullification*,

²⁷ Ibid., 44. Devlin cite le cas *R. v. Neal* [1949] 2 All E.R. 438.

²⁸ Ce terme, tombé en désuétude et propre à la *common law*, n'a pas vraiment d'équivalent français.

²⁹ Voir BLACKSTONE, *Commentaries*, 316.

³⁰ Ibid, par. 351.

³¹ L'histoire retiendra notamment le sort malheureux réservé aux jurés qui avait osé acquitter Sir Nicholas Throgmorton, accusé de haute trahison en 1554. Voir L. GRIFFITHS, *The History and Future of the Jury*, 11.

³² Voir COUR D'APPEL DE L'ONTARIO, *R. c. Pan*, [1999] 120 O.A.C. 1, par. 315 (=R c. Pan).

³³ *Bushel's Case* [1670] 124 E.R. 1006.

selon lequel un jury peut — dans les faits — acquitter un prévenu même si sa culpabilité objective ne fait aucun doute³⁴. Avec le *Bushel's case*, la nécessité de témoigner du contenu des délibérations après le procès perdra donc sa principale raison d'être.

Un siècle plus tard, le cas *Blaise c. Delaval* fera aussi jurisprudence. Bien que l'on ne pouvait plus accuser les jurés en vertu d'un *writ of attain*, il était toujours possible au XVIII^e siècle de faire invalider un verdict d'un jury, dans la mesure où un juré lui-même témoignait du déroulement inadéquat des délibérations. En 1785, à la suite d'un verdict de culpabilité, un des jurés avance que le jury a pris sa décision en votant à pile ou face et, donc, que l'accusé devrait être acquitté. Lord Mansfield refuse de recevoir l'affidavit provenant du juré se basant sur la règle *nemo auditur propriam suam turpitudinem allegans* voulant que *nul ne puisse se prévaloir de sa propre turpitude*. Il estimait qu'un juré ne pouvait déceimment alléguer avoir participé à une délibération fautive³⁵. Ce que la postérité retiendra pourtant du jugement de lord Mansfield est qu'il « vise à protéger les choses qui touchent au cœur du secret des délibérations du jury »³⁶. À un point tel qu'en *common law*, la règle du secret perpétuel des délibérations du jury est maintenant appelée *règle de lord Mansfield*.

Dans les deux siècles qui suivront, cette règle se verra attribuée une portée de plus en plus large. On considérera progressivement comme interdite toute divulgation relative au déroulement des délibérations, que celle-ci soit faite au tribunal ou ailleurs, qu'elle intervienne pendant ou après le procès³⁷. Cette interdiction sera une simple règle de conduite (*rule of conduct*)³⁸ traditionnellement bien respectée. L'avènement des médias de masse viendra toutefois bouleverser cet équilibre.

³⁴ Cette prérogative sera particulièrement utilisée dans le contexte du *Bloody Code*, ce code pénal anglais de la fin du XVIII^e siècle qui prévoyait plus de 200 infractions entraînant la peine de mort. Dans ce contexte, la *nullification* permettait au jury d'adoucir les excès du législateur.

³⁵ Par ailleurs, ce jugement intervenait aussi dans le cadre d'une sensibilité de plus en plus grande des tribunaux à l'effet que nul ne puisse s'inscriminer lui-même. Voir R. c. Pan, par. 318.

³⁶ R. c. Pan ; R. c. Sawyer, par. 60.

³⁷ Dans la salle des délibérations du *Old Bailey* — le plus célèbre tribunal pénal de Londres — se trouvait un écriteau sur lequel était inscrit : « To Members of the Jury : Her Majesty's Judges remind you of the solemn obligation upon you not to reveal, in any circumstances to any person either during the trial or after it is over, anything which has occurred in this room while you have been considering your verdict ». Voir L. GRIFFITHS, *The History and Future of the Jury*, 11

³⁸ De ce fait, elle n'a jamais, en elle-même, servi de base à une condamnation pour outrage au tribunal. Voir E. CAMPBELL, « Jury Secrecy and Contempt of Court », dans *Monash University Law Review*, 169 (1985), 170.

Dans les années '70, au Canada et en Grande-Bretagne, on constate que les médias rapportent des propos de jurés sur leurs délibérations. Les tribunaux constatent que ni la jurisprudence ni le droit statutaire, n'avaient fait du bris de confidentialité des délibérations du jury une faute pénale autonome³⁹. À la suite d'une recommandation en ce sens du Procureur général, le Parlement canadien adoptera en 1972 l'art. 576.2 du *Code criminel*⁴⁰ visant à protéger le secret de délibérations du jury en créant une infraction autonome à ce sujet. Celui-ci prévoit que : « Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire, tout membre d'un jury qui [...] divulgue tout renseignement relatif aux délibérations du jury, alors que celui-ci ne se trouvait pas dans la salle d'audience, qui n'a pas été par la suite divulgué en plein tribunal »⁴¹.

En 1981, le Parlement britannique adopte à son tour une disposition venant protéger le secret des délibérations. L'art. 8 (1) du *Contempt of court Act* prévoit que : « it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. »⁴² Ces dispositions font en sorte que non seulement le contenu des délibérations n'est plus admissible en cour mais que toute divulgation de celles-ci est maintenant une infraction criminelle⁴³.

À la suite de leur adoption, ces nouvelles dispositions législatives ont dû être examinées par les tribunaux à la lumière des droits fondamentaux, notamment le droit à un procès équitable reconnu, au Canada, par la *Charte canadienne des droits et libertés de la personne*⁴⁴ et, au Royaume-Uni, par la *Convention européenne des droits de l'homme*⁴⁵. La question était la suivante : lorsque la règle du secret des délibérations s'oppose à une enquête sur des

³⁹ Voir notamment *Attorney General v. New Statesman & Nation Publishing Co. Ltd.*, [1981] 1 Q.B. 1, 7. Une divulgation faite dans un but d'obstruction de la justice — comme d'ailleurs tout autre geste ayant un but similaire — pouvait toutefois faire l'objet d'une condamnation pour outrage au tribunal.

⁴⁰ (Canada), 1985, c C-46 (= *C.cr.*).

⁴¹ Cet article deviendra l'art. 649 avec la refonte du *C.cr.* en 1985.

⁴² (Royaume-Uni), 1981, c. 9.

⁴³ Notons que les États-Unis n'ont pas emboîté le pas sur cette question. Une telle interdiction y pose des problèmes constitutionnels, puisque le premier amendement de la constitution américaine protège la liberté de presse. Voir *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983).

⁴⁴ Charte canadienne des droits et libertés, Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (Royaume-Uni), 1982, c. 11, art. 11 d.

⁴⁵ Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales telle qu'amendée par les Protocoles n° 11 et n° 14, Rome, 4.XI.1950, art. 6.

allégations de partialité du jury, laquelle doit avoir priorité ? Dans les arrêts *R. c. Pan* et *R. c. Sawyer*, rendus par la Cour Suprême du Canada en 2001, de même que dans *R. v. Mirza* et *R. v. Connor*⁴⁶, rendus par la Chambre des lords en 2004, les appelants demandaient que des propos tenus par des jurés pendant les délibérations — notamment des propos racistes — soient admis afin de faire la lumière sur le caractère inéquitable du verdict rendu. Ces quatre pourvois ont été rejetés, les tribunaux ayant privilégié le secret des délibérations.

Tout en rejetant le pourvoi des appelants, la Cour Suprême du Canada a cependant accepté de créer certaines exceptions au secret des délibérations. Ainsi, la Cour a établi une distinction entre les éléments *internes* et les éléments *externes* de la délibération, ce qui l'a amené à redéfinir ainsi *règle de lord Mansfield*.

Les déclarations, opinions, arguments et votes des membres d'un jury dans le cours de leurs délibérations sont inadmissibles dans toute instance judiciaire. Plus particulièrement, un juré ne peut témoigner sur l'effet qu'a eu quoi que ce soit sur son esprit, ses sentiments ou sa décision finale, ou sur l'esprit, les sentiments ou la décision finale des autres jurés. Par ailleurs, la règle de *common law* ne rend pas inadmissible la preuve de faits, déclarations ou événements extérieurs au processus de délibération et susceptibles d'avoir vicié le verdict, que cette preuve émane d'un juré ou d'un tiers⁴⁷.

Ainsi, si un employé du tribunal donnait à un juré une information non mise en preuve, il s'agirait d'un élément extérieur aux délibérations, donc non protégé par le secret. À l'inverse, le fait que les jurés aient tenu compte ou non de cette information serait un élément interne, donc protégé par le secret. En fait, la Cour estime que nul ne doit avoir accès au *processus mental* des jurés vers le verdict. À cet égard, elle fait une analogie intéressante avec la situation d'un juge, réfléchissant en lui-même à la décision à rendre.

Les motifs écrits du juge ne révèlent que les raisons qui l'ont amené en bout de ligne à trancher l'affaire comme il l'a fait. Ils ne révèlent pas nécessairement tous les raisonnements et toutes les hésitations, questions et révisions ayant conduit à la version finale de ces motifs écrits. De même, les opinions qu'ont exprimées les jurés au cours de leurs délibérations ainsi que les discussions qu'ils ont eues à ce moment-là ne sont pas divulguées — seul le verdict final du jury est rendu public. La décision d'un juge peut être contestée en appel, mais le juge ne peut être contraint de témoigner au sujet des

⁴⁶ HOUSE OF LORDS, *R. v. Connor ; R. v. Mirza*, [2004] U.K.H.L. 2 (= *R. v. Connor ; R. v. Mirza*).

⁴⁷ *R. c. Pan ; R. c. Sawyer*, par. 77. En cela, le Canada tend à se rapprocher de la jurisprudence américaine qui a nuancé la règle de lord Mansfield par l'*Iowa rule*, qui permet de mettre en preuve des éléments s'étant produit dans la salle des délibérations sans être inhérents aux délibérations elles-mêmes. Voir E. CAMPBELL, *Jury Secrecy and Contempt of Court*, 186.

raisons pour lesquelles il est arrivé à une décision judiciaire donnée et de la manière dont il y est parvenu⁴⁸.

En 2004, dans deux causes présentant des faits similaires, la Chambre des lords a elle aussi refusé de lever le secret des délibérations et a privilégié le secret des délibérations sur l'apparence de partialité d'un juré. Estimant que la règle du secret des délibérations devait être la plus complète, la plus simple et la plus claire possible⁴⁹, elle a refusé de reconnaître l'exception canadienne relative aux *éléments externes*. Dans son jugement, lord Earls-ferry constate que l'histoire du droit sur cette question démontre qu'il est difficile de gérer des exceptions en matière de secret des délibérations.

If it were indeed possible to devise a workable exception which would not eat up the rule, then that might be the ideal solution. But over the years judges of the highest authority have considered the matter and have not found such a solution. [...] Unfortunately, in formulating the law judges today can claim no greater skill or knowledge than their distinguished predecessors. They cannot draw lines or make distinctions which those predecessors rightly felt unable to draw or to make⁵⁰.

La Chambre estime que de créer de telles exceptions créerait une brèche qui, tôt ou tard, minerait la norme⁵¹ et qu'à ce chapitre, la sagesse commande de s'en tenir à une règle qui, bien qu'imparfaite, a fait ses preuves.

1.3 — Le rôle du jury et la justification de la *règle de lord Mansfield*

L'importance accordée de nos jours à la *règle de lord Mansfield* est intimement liée au rôle actuel du jury et au fait que son fonctionnement — sa survie même — soient inextricablement liés à cette règle.

1.3.1 — *Le rôle du jury*

Ayant assisté à la présentation complète de la preuve et à partir de celle-ci, le jury a à établir quels sont les faits qui se sont réellement produits et à évaluer si ceux-ci doivent conduire à une condamnation en vue d'en venir à un verdict. Le jury, juge des faits, a un rôle complémentaire à celui du juge au procès, chargé de déterminer le droit.

⁴⁸ Ibid., par. 44-45. Cette situation n'est pas sans rappeler non plus le c. 1455 §2 *CIC* relatif au secret des délibérations des juges, dans un tribunal collégial.

⁴⁹ R. v. Connor ; R. v. Mirza, par. 122.

⁵⁰ Ibid., par. 172.

⁵¹ Ibid., par. 171.

Les coûts élevés, les délais et la complexité croissante des causes font en sorte que, de nos jours, le jury n'intervient que très exceptionnellement dans certains procès civils et la très grande majorité des causes criminelles sont jugées devant un juge seul⁵². L'histoire du jury a évolué à la fois vers une diminution de son utilisation et une augmentation de la portée de ses décisions puisque le verdict d'un jury est final et sans appel. Comme le dit le juge dans ses directives au jury : « Si je fais erreur sur les règles de droit, mon erreur peut être corrigée par la cour d'appel parce que les directives que je vous donne sont enregistrées et seront disponibles en cas d'appel. Vos délibérations, cependant, sont secrètes. Si vous faites erreur dans l'application du droit, la cour d'appel ne pourra examiner vos délibérations »⁵³.

Au-delà de cette finalité immédiate, soit celle d'établir un verdict dans une cause, le jury a aussi comme rôle social de maintenir la confiance du public dans le système de droit. Comme le mentionne la juge Claire L'Heureux-Dubé : « Sa représentativité en fait la conscience de la collectivité. De plus, le jury peut servir de dernier rempart contre les lois oppressives ou leur application. Il constitue un moyen par lequel le public acquiert une meilleure connaissance du système de justice criminelle et, grâce à la participation du public, le jury accroît la confiance de la société dans l'ensemble du système »⁵⁴. Douze jurés, non spécialisés en droit⁵⁵, choisis parmi les citoyens ordinaires, sans lien avec la cause, sont appelés à délibérer collectivement en vue d'une décision unanime⁵⁶. Puisque chacun aurait pu faire partie du jury, tous peuvent se reconnaître en lui. Puisque chacun se sait faillible, l'unanimité du groupe rassure.

Si un jury ne peut condamner à l'encontre de la preuve⁵⁷, il peut choisir de ne pas appliquer une disposition qu'il juge abusive, ce que l'on a évoqué plus tôt comme étant la *jury nullification*. Au Canada, le cas le plus célèbre est sans doute celui du Dr. Morgentaler, que le jury a acquitté d'avoir pratiqué des avortements, à l'encontre de la preuve établie au procès :

[...] le jury jouit *de facto* du pouvoir de ne pas tenir compte des règles de droit que lui dicte le juge. Nous ne pouvons pénétrer dans la salle des

⁵² Le jury est utilisé dans moins de 1% des causes criminelles. Voir A. SANDERS et R. YOUNG, *Criminal Justice*, 2^e éd., Londres-Édimbourg-Dublin, Butterworths, 2000, 552.

⁵³ *Modèle de directives au jury*, art. 8.2. Comme nous le verrons plus tard, le caractère final d'un verdict souffre un nombre très limité d'exceptions.

⁵⁴ R. c. Pan ; R. c. Sawyer, par. 44.

⁵⁵ Lord Devlin ajoute même "unaccustomed to severe intellectual exercise or to protracted thought." Voir DEVLIN, *Trial by Jury*, Londres, Stevens, 1956, 2.

⁵⁶ Au Royaume-Uni, en cas d'impasse, le juge a discrétion pour accepter un verdict à 10 contre 2. Cf. *Criminal Justice Act* (Royaume-Uni), 1967, c. 80, art. 13.

⁵⁷ Voir art. 686 (1) a). *C.cr.*

délibérations du jury. Le jury n'a jamais à expliquer les raisons qui sous-tendent son verdict. Il se peut même que, dans certaines circonstances limitées, la décision secrète d'un jury de refuser d'appliquer la loi fasse de lui, pour reprendre les termes du document de travail de la Commission de réforme du droit du Canada : le « protecteur ultime des citoyens contre l'application arbitraire de la loi et contre l'oppression du gouvernement »⁵⁸.

Le système judiciaire ayant depuis longtemps fait le constat qu'un juge seul est aussi apte qu'un jury à rendre une décision éclairée, c'est sans doute la préservation du public dans le système de justice qui est de nos jours la fonction la plus importante du jury. Malgré les inconvénients qu'il présente — lourdeur du processus, coûts élevés et impacts sur les jurés eux-mêmes — le système de justice et les gouvernements ne cessent de redire l'importance du jury, tant comme outil que comme symbole.

1.3.2 — *La justification de la règle*

Pour plusieurs, la survie du jury comme institution passe par une stricte application de la règle du secret des délibérations.

There are powerful arguments against breaching the secrets of the jury room. Serious consequences may flow from an approach to a juror, particularly after a trial which has attracted great publicity, followed by the publication of an account of what the juror has said about the discussion in the jury room. If not checked, this type of activity might become the general custom. If so, it would soon be made to appear that the secrecy of the jury room had been abandoned, and if that happened, it is not beyond the bounds of possibility that trial by jury would go the same way⁵⁹.

Comment expliquer qu'on puisse établir un tel lien de nécessité entre la règle de lord Mansfield et le fonctionnement du jury, étant entendu que le secret perpétuel des délibérations n'est arrivé que bien après la création du jury ? Cela tient généralement à trois arguments principaux : l'importance du secret pour la franchise des débats, le caractère final du verdict et la protection des jurés contre le harcèlement.

De nos jours, ce n'est plus la simple unanimité du verdict qui compte mais aussi la qualité objective du processus ayant conduit à celui-ci, notamment la qualité de la preuve et les circonstances des délibérations. Or, comme l'a

⁵⁸ COUR SUPRÊME DU CANADA, *R. c. Morgentaler*, [1988] 1 R.C.S. 30, par. 61.

⁵⁹ COURT OF APPEAL OF ENGLAND AND WALES, *Attorney General v. New Statesman & Nation Publishing Co. Ltd.* 9-10.

fait remarquer la Cour suprême du Canada, si le secret favorise le consensus, il favorise d'abord la qualité du débat.

La confidentialité encourage la franchise et le genre de débats ouverts et exhaustifs essentiels à ce type de processus décisionnel collégial. Tout en visant à l'unanimité, les jurés doivent être libres d'explorer toutes les façons de voir les choses sans avoir à craindre de s'exposer au ridicule, au mépris ou à la haine. Cette justification est d'une importance vitale pour l'acquittement potentiel d'un accusé impopulaire ou d'une personne inculpée d'un crime particulièrement répugnant⁶⁰.

Le deuxième argument traditionnel en faveur du secret est la solennité et le caractère définitif du verdict. La finalité du verdict fait en sorte que les jurés doivent délibérer avec sérieux, sachant que la décision qu'ils rendront sera finale.

If verdicts were liable to be set aside by the simple expression of dissatisfaction or disagreement by individual jurors subsequent to its delivery, there is a risk that juries may not approach their task with the seriousness and solemnity that the occasion requires. The consequences flowing from a jury verdict are very important to all persons involved. It is crucial that, when formally announced, it represents the final word on the matter⁶¹.

Or, certaines déclarations sur le contenu des délibérations pourraient être de nature à soulever un doute chez le public sur le bien-fondé du verdict et amener sa remise en cause.

The verdict is the product of a dynamic process that would likely self-destruct if any attempt were made to break it into its component parts. As also noted earlier, individual jurors can arrive at their decision by different routes and for different reasons. But at the time the verdict is announced, they speak with one voice. The manifestation of individual differences of opinion could only undermine the value of the verdict in the eyes of the public⁶².

Cette dernière remarque est particulièrement importante dans la mesure où elle met en lumière le fait que le secret des délibérations permet de maintenir une fiction utile : l'univocité du verdict. C'est une chose de savoir que, de façon théorique, le verdict peut être atteint par des chemins différents, voire contradictoires⁶³. C'en est une autre de le constater dans un cas précis.

⁶⁰ R. c. Pan ; R. c. Sawyer, par. 50.

⁶¹ R. c. Pan, par. 168.

⁶² Ibid., par. 169-170.

⁶³ Cette possibilité est expressément évoquée par le juge lorsqu'il s'adresse aux jurés : « vous pourriez être tous convaincus hors de tout doute raisonnable de la culpabilité de (NDA), même si, individuellement, vous avez des interprétations différentes de la preuve. De même, vous pourriez tous avoir un doute raisonnable à l'égard de la culpabilité de (NDA), mais pour des raisons différentes ». Cf. *Modèle de directives au jury*, art. 12.3.

Le bien du système exige que, s'il y manque d'univocité dans le verdict, les jurés en demeurent les seuls témoins.

Finalement, la protection des jurés contre le harcèlement, provenant notamment des médias, est aussi un enjeu. La Chambre des lords a ainsi établi un lien direct entre la protection des jurés et la qualité même du verdict : « The rule protects jurors who acquit the unpopular, such as members of minority groups, or who acquit those accused of crimes that the public regards as repulsive, such as the abuse of children who were in their care. It protects them too against pressure that might otherwise be brought to bear, in less enlightened times, by the executive. This is an important safeguard against biased verdicts »⁶⁴.

Même si plusieurs arguments soutiennent le secret des délibérations du jury, celui-ci a évidemment un revers important, celui de rendre difficile le redressement d'un tort commis en matière d'équité, lors des délibérations. Les tribunaux ont toutefois estimé que le droit actuel permettait à la fois de prévenir la plupart de ces situations ou d'y remédier, le cas échéant.

En matière de prévention, plusieurs éléments sont évoqués. Le premier est la composition diversifiée du jury et le processus de sélection des jurés. Les avocats et le juge ont la possibilité d'évaluer le risque de partialité au moment de la sélection du jury et de récuser un certain nombre de candidats, avec ou sans justification. Même en cours de procès, un juré peut être renvoyé « lorsque le juge du procès apprend qu'un juré a été soumis à des influences externes inacceptables ou encore qu'il est incapable de s'acquitter adéquatement de son rôle de juré ou non disposé à le faire »⁶⁵. Le sérieux entourant la définition du travail du jury est aussi un facteur de prévention : le serment des jurés est un engagement solennel et leurs délibérations sont encadrées par des directives données par le juge. Finalement, la règle de l'unanimité aide aussi à prévenir le risque d'un verdict partial⁶⁶.

Au plan curatif, il existe aussi deux dispositions permettant de casser un verdict inique. La première est la possibilité de faire appel d'un verdict de culpabilité en invoquant le caractère déraisonnable du verdict si ce dernier ne peut pas s'appuyer sur la preuve⁶⁷. On comprendra que ces cas sont rares, puisque l'accusation repose — à tout le moins — sur une apparence de

⁶⁴ R. v. Connor ; R. v. Mirza, par. 115-116.

⁶⁵ Ibid., 96. *By allowing jurors to raise allegations of outside interference or overt bias or improper behaviour in the deliberations, the judge can ensure that the jury system has worked as it should.* R. v. Connor ; R. v. Mirza, par. 50.

⁶⁶ R. c. Pan ; R. c. Sawyer, par. 99. Il s'agit d'une application de l'art. 644(1) C.cr.

⁶⁷ Cf. art. 686(1) a) C.cr.

preuve. L'autre disposition est une enquête en cas d'entrave à la justice, notamment dans un cas où un jury aurait accepté un pot-de-vin ou encore été victime de menace. Dans les cas d'entrave, l'obligation de confidentialité est explicitement levée⁶⁸. Aux yeux des tribunaux, tous ces éléments sont des garanties permettant de remédier aux inconvénients de la *règle de lord Mansfield*.

Nous avons vu dans ce chapitre à quel point la règle du secret des délibérations est intimement liée à l'institution même du jury. Depuis les débuts du jury, la séquestration et l'*incommunicado* sont associés à l'indépendance et au bon fonctionnement de cette institution. En cours de route, la règle du secret perpétuel s'est ajoutée et, depuis peu, sa violation est même considérée comme une faute pénale. Nous verrons maintenant que, bien que s'inscrivant dans un univers juridique distinct, la relation entre le conclave et son secret a connu une évolution étrangement semblable.

2 — *Le conclave et son secret*

La plupart des modes de gouvernement connaissent une continuité du pouvoir le mandat d'un président se termine au début du mandat d'un autre. L'Église, pour sa part, admet un temps où non seulement on ne sait pas *qui* exercera les pouvoirs du pape précédent mais où il y a même interruption de la *plenitudo potestas*⁶⁹. Cet interrègne a plusieurs fois mis l'indépendance et l'unité de l'Église à risque⁷⁰. Dans ce contexte, la quête d'un mode de désignation du pape qui soit clair, rapide et indépendant traverse l'histoire de l'Église des débuts jusqu'à nos jours.

2.1 — La formalisation d'un processus électoral

Comme dans le cas du jury, le conclave est le fruit d'une évolution historique qui se cristallisera au détour du XIII^e siècle. Cela n'est pas un hasard dans la mesure où le conclave est lui aussi un héritier de la réforme

⁶⁸ Art. 649 a) *C.cr.et Contempt of Court Act*, art. 8 (2).

⁶⁹ « Pendant la vacance du Siège apostolique, le Collège des Cardinaux n'a aucun pouvoir ni aucune juridiction sur les questions qui sont du ressort du Souverain Pontife ». JEAN-PAUL II, Constitution apostolique sur la vacance du Siège apostolique et l'élection du Pontife romain *Universi dominici gregis*, 22 février 1996, dans AAS, 93 (1996) (=UDG), art. 1.

⁷⁰ Voir J. ALLEN, *Conclave : The Politics, Personalities, and Process of the Next Papal Election*, New York et Toronto, Image, 2002, 70 (=ALLEN, *Conclave*).

grégorienne. Celle-ci a mené à son achèvement un processus de formalisation du processus électoral entrepris des siècles plus tôt.

2.1.1 — *Le jugement de Dieu et le consentement de tous*

Si l'Église de Rome a joui très tôt d'un prestige reconnu, son évêque prendra un certain temps à s'imposer comme chef de l'Église. Au cours des premiers siècles, l'évêque de Rome est donc désigné de la même façon que n'importe quel autre évêque soit *par le jugement de Dieu et le consentement de tous*⁷¹. Le tout, vraisemblablement selon la procédure évoquée par Hippolyte de Rome dans la *Traditio Apostolica* : par accord unanime du clergé et du peuple, avec ratification des évêques de la province⁷². Si — hier comme aujourd'hui — l'élection de l'évêque de Rome était un exercice de docilité à la volonté de Dieu, l'unanimité du peuple — aussi appelée *inspiration* — était perçue comme étant la seule pouvant garantir la dimension divine de l'élection⁷³.

En 380, Théodose fait du christianisme la religion d'état, décrétant que « tous les peuples que régit la modération de Notre Clémence s'engagent dans cette religion que le divin Pierre Apôtre a donné aux Romains — ainsi que l'affirme une tradition qui depuis lui est parvenue jusqu'à maintenant — et qu'il est clair que suivent le pontife Damase 1^{er} et l'évêque d'Alexandrie »⁷⁴. L'Église sort alors de la clandestinité pour devenir religion d'État. D'autre part, le siège de Pierre — alors occupé par le *pontife* — est reconnu comme siège apostolique⁷⁵. La papauté acquerra ainsi une dimension politique nouvelle, modifiant de façon importante les enjeux entourant la succession du pape.

L'intérêt politique, notamment celui de la noblesse romaine, pèsera sur l'intégrité du processus électoral. Selon la formule *Exspectarentur certe vota civium, testimonia populorum, honoratorum arbitrium, electio*

⁷¹ Voir X. BARBIER DE MONTAULT, *Étude historique et canonique sur l'élection des papes*, Poitiers et Paris, H. Oudin Frères Libraires-éditeurs, 1878, 3 (=BARBIER DE MONTAULT, *Étude historique et canonique*).

⁷² Voir B.A. FERME, « The Search for Legal Certainty: a gloss on Papal Elections in the Middle Ages », dans *Ephemerides Iuris Canonici*, 53 (2013), 294.

⁷³ Comme en fait foi l'expression *Vox populi, vox dei*. Voir J.M. COLOMER, et I. MCLEAN, « Electing Popes: Approval Balloting and Qualified-Majority Rule », dans *Journal of Interdisciplinary History*, 29 (juin 1998), 6 (=COLOMER et MCLEAN, « Electing Popes »).

⁷⁴ Cité dans J. FERNÁNDEZ, *El sistema electivo del romano pontífice: origen de su autoridad suprema en el ordinamento canónico actual*, Buenos Aires, Editorial Dunken, 2011, 154 (= FERNÁNDEZ, *El sistema electivo*).

⁷⁵ Ibid.

*clerocirum*⁷⁶, les évêques de la province romaine choisiront l'évêque de Rome à partir de candidatures soumises par le peuple et évaluées par le clergé et la noblesse. Les dissensions politiques au sein de cette dernière se traduiront parfois par des élections tenues simultanément par différentes factions, notamment en 366 et en 418. Cela conduira l'empereur à se porter garant du processus électoral. En 420, afin de prévenir de nouvelles divisions⁷⁷, ce dernier rappelle que l'élection doit être le fait de la communauté parlant d'une seule voix.

2.1.2 — *La constitution d'un collège électoral*

L'unanimité, apanage d'une communauté restreinte et homogène, devient de plus en plus difficile à obtenir avec les années. Par ailleurs, le flou entourant l'identité et le rôle réel de chacun des groupes d'électeurs crée problème. En 499, le pape Symmaque convoque un synode des évêques afin de remédier à cette situation. Ce dernier adopte le décret *Consilium dilectionis vestrae*, qui est le premier effort de législation canonique en matière de succession papale⁷⁸. Du vivant du pape il est désormais interdit de discuter du choix de son successeur sans son consentement ou encore, de faire des promesses en ce sens. Le pape pourra désigner son successeur ; à défaut le clergé de Rome pourra élire le pape à l'unanimité ou à la majorité.

En 554, la *Pragmatica sanction* de Justinien précise que l'élection du pape devra recevoir le *placet* impérial⁷⁹. Avec la chute de Ravenne et l'arrivée des Carolingiens au VIII^e siècle, ce *placet* disparaît et se limite à une communication du résultat de l'élection à l'empereur. Le siècle qui suit permet à l'Église de connaître une certaine accalmie quant à l'intégrité et l'indépendance du processus électoral. À l'inverse, le X^e siècle sera une des périodes les plus noires de l'Église à ce chapitre⁸⁰. La papauté devient

⁷⁶ Que l'on pourrait traduire par : *Avoir obtenu les votes des citoyens, le témoignage du peuple, l'assentiment de la noblesse et l'élection du clergé*. Voir G. ZIZOLA, *Il conclave: storia e segreti: l'elezione papale da San Pietro a Giovanni Paolo II*, Rome, Grandi Tascabili Economici Newton, 1997, 24 (=ZIZOLA, *Il conclave: storia e segreti*).

⁷⁷ Voir COLOMER et McLEAN, « Electing Popes », 4.

⁷⁸ FERNÁNDEZ, *El sistema electivo*, 160.

⁷⁹ Notons qu'en cela, le pape ne se distingue pas de plusieurs autres évêques orientaux qui doivent obtenir l'approbation impériale eux aussi. Voir FERNÁNDEZ, *El sistema electivo*, 165.

⁸⁰ Ibid., 171. En 931, le fils du pape Serge et de sa maîtresse, soutenu par la noblesse, devient pape sous le nom de Jean XI. Voir F. J. BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy: The Historical Background of the Rigid Secrecy Found in Papal Elections », dans *The Catholic Historical Review*, 89 (2003), 166 (=BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy »).

littéralement l'objet de puissantes familles romaines qui se la disputent âprement, notamment par la force. Heureusement, la réforme clunisienne fera souffler sur l'Église un vent nouveau.

Élu en 1049, Léon IX sera le véritable initiateur de la réforme à laquelle Grégoire VII donnera plus tard son nom. Il tendra à internationaliser le cardinalat⁸¹ du diocèse de Rome, les étrangers étant plus enclins à réformer l'Église⁸² que les Romains, alors habitués aux intrigues. Quelques années plus tard, en 1059, son successeur Nicholas II publie la bulle *In nomine Domini*. Il y est précisé que le choix du pape sera dorénavant effectué uniquement par cette portion du clergé romain constituée des cardinaux : les cardinaux évêques suburbicaires de Rome s'entendront sur un candidat dont le nom sera soumis aux cardinaux prêtres et diacres, pour élection. Le rôle du clergé inférieur et du peuple sera limité à celui d'entériner la décision prise⁸³.

Loin de mettre un terme aux problèmes de succession, le siècle qui suivra sera caractérisé par une succession quasi ininterrompue de schismes et d'ingérences extérieures prenant appui ou s'expliquant par des déficiences du mode d'élection papale⁸⁴. Dans le but de clarifier la situation, le Concile de Latran III établit, en 1179, que trois modes d'élection seront désormais permis : l'union des capitulants « comme par une inspiration divine »⁸⁵, la nomination de commissaires qui élisent au nom et à la place des électeurs (aussi appelée compromis) et le scrutin. Le décret *Licet de evitanda discordia* fait aussi disparaître les différences entre les ordres de cardinaux pour le choix du pape. Il prévoit que l'élection se fera dorénavant aux deux tiers des voix des cardinaux⁸⁶. L'unanimité imposait un fardeau difficile à rencontrer et la majorité simple avait comme désavantages de permettre l'élection d'un candidat polarisant et de laisser insatisfaits un grand nombre d'électeurs.

⁸¹ Depuis la fin du VIII^e siècle, plusieurs diocèses connaissent un système de cardinalat local, composé de clercs assistant les évêques diocésains d'une façon particulière et se voyant conférer des fonctions liturgiques spécifiques. FERNÁNDEZ, *El sistema electivo*, 174.

⁸² Ibid.

⁸³ Voir J.-P. PHAM, *Heirs of the Fisherman: Behind the Scenes of Papal Death and Succession*, Oxford et New York, Oxford University Press, 2004, 59 (=PHAM, *Heirs of the Fisherman*).

⁸⁴ Ibid., 62 et ZIZOLA, *Il conclave: storia e segreti*, 42.

⁸⁵ Voir M.-R.-A. HENRION, *Code ecclésiastique français, d'après les lois ecclésiastiques d'Héricourt*, Paris, J.-J. Blaise Aîné, 1828, 136.

⁸⁶ Des siècles plus tard, en 1458, Pie II écrira qu'une élection décidée aux deux tiers des cardinaux ne peut être qu'inspirée par l'Esprit-Saint. Voir COLOMER et MCLEAN, « Electing Popes », 7.

2.2 — L'instauration du conclave et de son secret

La constitution d'un collège électoral bien défini était le prérequis à cette autre évolution décisive du processus électoral que sera le conclave. Si, au départ, l'idée du conclave émane de ce collège électoral, sa formalisation juridique se fera toutefois à son corps défendant.

2.2.1 — *Les proto-conclaves*

En 1198, les cardinaux choisissent de se réunir à l'écart dans une ancienne forteresse de Rome, le *Septizonium*, afin de procéder à l'élection du successeur de Célestin III. Pour la première fois, non seulement les cardinaux s'isolent⁸⁷ mais font monter la garde afin que personne ne vienne perturber leurs débats. Les cardinaux seront de nouveau isolés en 1216, à la mort d'Innocent III. Cette fois-ci, ce seront les autorités de Pérouse qui les confineront dans le palais épiscopal afin de les protéger d'une foule déchaînée⁸⁸ ; deux jours plus tard ils procèdent à l'élection d'Honorius III. En 1241, cette apparente efficacité de la clôture inspirera les autorités civiles romaines qui, exaspérées devant l'impasse dans laquelle se trouvent les cardinaux électeurs, décideront de les enfermer de nouveau dans le *Septizonium*⁸⁹.

En 1268, s'ouvre la période de vacance la plus longue de l'histoire. À cette époque, les cardinaux électeurs pouvaient aller et venir librement de leur diocèse au lieu de l'élection et chacun pouvait se laisser librement influencer par l'une ou l'autre faction du pouvoir politique civil. Ainsi, nombreux étaient les protagonistes indirects de l'élection, ce qui pouvait passablement allonger les choses⁹⁰. Après 14 mois, déchirés entre les intérêts français et italiens, les cardinaux décident de s'enfermer dans le palais des papes de Viterbe où était décédé Clément IV⁹¹. L'impasse perdure. Les autorités de la ville perdront patience et décideront de murer le palais, coupant les allées et venues des cardinaux. Une partie du toit des dortoirs est temporairement ôtée pour

⁸⁷ Les cardinaux s'étaient déjà réunis à l'écart et en secret dans des monastères romains, en 1118 et 1145, pour échapper à la menace que faisaient peser sur eux la foule et le sénat romain.

⁸⁸ Voir C. KRAMER VON REISSWITZ, *Les faiseurs de papes : les cardinaux et le conclave*, Strasbourg, Éditions du Signe, 2002, 91 (=KRAMER VON REISSWITZ, *Les faiseurs de papes*).

⁸⁹ Cette claustration involontaire et la canicule qui prévaut feront que plusieurs cardinaux tombent malades, un décède. Celui qui sera élu au bout de 70 jours, Célestin IV, mourra lui-même 17 jours après. Voir A. MELLONI, *Le conclave : histoire, fonctionnement, composition*, Paris, Éditions Salavator, 2003, 102.

⁹⁰ Voir BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 168.

⁹¹ Ibid. De fait, il était de tradition de tenir l'élection dans la ville où était décédé le pape.

« rénovation », l'accès aux bains interdit, la nourriture rationnée⁹². Près de trois ans après son début, l'élection se résout finalement grâce à la technique du compromis : les 16 électeurs toujours vivants confieront leur droit de vote à 6 d'entre eux, qui éliront finalement Grégoire X.

2.2.2 — *L'institution du conclave et son développement*

Ce dernier promulguera en 1274 la bulle *Ubi periculum*, qui fera dorénavant du conclave le mode d'élection officiel du pape.

Avec l'approbation du saint Concile, Nous décidons que [les cardinaux se] réuniront tous dans le palais qu'habitait le pontife, chacun prenant avec lui un seul serviteur, clerc ou laïc, à sa convenance. [...] Dans le même palais, tous habiteront en commun un seul appartement (*conclave*), sans cloison ou tenture pour les isoler ; l'accès à la chambre secrète demeurant réservé librement, cet appartement sera clos de toutes parts, en sorte que nul ne puisse ni y entrer ni en sortir. Nul ne pourra rencontrer les cardinaux ni n'aura la permission de s'entretenir secrètement avec eux. Ils ne recevront aucune visite, sinon de ceux qui, par la volonté de tous les cardinaux présents, seraient appelés pour affaires concernant l'élection imminente. Nul ne pourra envoyer message ou lettre aux cardinaux ou à l'un d'entre eux. Celui qui transgresserait cette défense, en envoyant lettre ou message, ou en s'entretenant secrètement avec un cardinal, encourrait *ipso facto* l'excommunication. Dans ledit appartement [*conclavi*], on ménagera une fenêtre capable de laisser commodément les vivres destinés aux cardinaux mais par laquelle il serait impossible à quiconque de s'introduire.⁹³

Le terme *conclave* désigne ici la pièce — fermée à clé (*cum clavis*) — où les cardinaux résident et délibèrent ; ce terme évoluera pour comprendre aussi l'assemblée qui y est réunie. La bulle indique que la seule activité ou préoccupation des cardinaux doit être l'élection du pape, le camerlingue s'occupant de gérer les biens des cardinaux à leur place. Elle vise précisément à ce que les cardinaux ne puissent plus poursuivre leurs affaires personnelles — et souvent lucratives — notamment par le trafic d'influence⁹⁴. Le décret indique finalement que les cardinaux doivent oublier les *affections particulières, pactes, promesses ou serments* qui pourraient entraver leur

⁹² Voir A. FRANCHI, *Il conclave di Viterbo (1268-1271) e le sue origini: saggio con documenti inediti*, Ascoli Piceno, Porziuncola, 1993, 73.

⁹³ Voir H. WOLTER, *Lyon I et Lyon II*. Histoire des conciles œcuméniques, n° 7, Paris, Éditions de l'Orante, 1966.

⁹⁴ Voir G. SALE, s.j., « Il conclave segretezza, libertà e sollecitudine per la chiesa », dans *La Civiltà Cattolica*, n° 3905 (2 mars 2013), 440 et ZIZOLA, *Il conclave: storia e segreti*, 51.

choix⁹⁵. L'objectif était d'encourager la vitesse, de centrer les électeurs sur les enjeux proprement ecclésiastiques, d'assainir les pratiques et de réduire la pression politique qui, à cette époque, relevait davantage de la noblesse que des princes catholiques⁹⁶.

Les cardinaux acceptent mal ce décret, qui est suspendu deux ans plus tard. En conséquence, les conclaves auront alors tendance à s'éterniser : 6 mois (en 1277), 5 mois (de 1280 à 1281), 11 mois (de 1287 à 1288), 27 mois (de 1292 à 1294), 11 mois (de 1304 à 1305). En 1311, Célestin V réintroduit les normes d'*Ubi periculum*.

De retour d'Avignon à Rome, Grégoire XI s'éteint en 1378⁹⁷. Craignant qu'un élu français ne décide de repartir en Avignon, les Romains exigent que son successeur soit italien, faisant ainsi pression sur les cardinaux qui élisent Urbain VI. Ce dernier prendra une série de décisions fortement impopulaires auprès des cardinaux⁹⁸ qui finiront par invoquer la contrainte dont ils furent victimes pendant le conclave pour remettre en cause la validité de l'élection. Cela donnera naissance au Grand schisme d'Occident qui ne prendra fin qu'en 1417, par l'élection de Martin V à l'occasion du Concile de Constance. Souhaitant résoudre le schisme par l'élection d'un pape reconnu par tous, les nations catholiques représentées au Concile se méfient des cardinaux, sujets à l'influence des grandes familles romaines⁹⁹. Elles imposeront donc que 6 prélats de chacune des 5 nations catholiques représentées prennent aussi part au conclave. Certains voulurent éliminer le secret, prétendant que les délibérations devraient se faire en public¹⁰⁰. Mais même en cette période de crise de confiance envers le collège cardinalice, on préféra maintenir le conclave et son secret.

Au milieu du XV^e siècle, le pouvoir papal redevient l'otage des jeux de pouvoir entre familles et puissances catholiques. Les élections qui suivent

⁹⁵ Voir FERNÁNDEZ, *El sistema electivo*, 191. Ces règles ressemblaient à celles régissant l'élection des magistrats de plusieurs villes italiennes. Voir KRAMER VON REISSWITZ, *Les faiseurs de papes*, 93.

⁹⁶ Voir BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 169.

⁹⁷ Il avait promulgué le décret *Periculis et detrimentis* établissant que le conclave devrait dorénavant se tenir là où il était possible de réunir le plus grand nombre de cardinaux, abolissant aussi la majorité aux 2/3 pour revenir à la majorité simple. Techniquement donc, il devenait possible pour un petit nombre d'électeurs d'élire un pape. Voir KRAMER VON REISSWITZ, *Les faiseurs de papes*, 96 et ZIZOLA, *Il conclave: storia e segreti*, 62.

⁹⁸ De tendance réformiste, Urbain tentera notamment de simplifier les cardinaux de leur style de vie pompeux qui s'était développé à la cour d'Avignon, en les privant d'une partie de leurs privilèges. Voir FERNÁNDEZ, *El sistema electivo*, 197. Il refusera aussi la convalidation de son élection par concile. Voir ZIZOLA, *Il conclave: storia e segreti*, 65.

⁹⁹ Ibid., 75.

¹⁰⁰ Voir BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 169.

sombrent dans la simonie et le népotisme. À telle enseigne qu'en 1503, un des enjeux du conclave est de déterminer si la succession papale ne devrait pas se faire sous le mode dynastique¹⁰¹. Le relâchement des mœurs se traduira aussi par un relâchement de la clôture du conclave ; au tournant du XV^e siècle, les ambassadeurs ont libre accès aux électeurs¹⁰².

Jules II et Pie IV travailleront à rétablir la discipline et l'indépendance du processus. En 1513, le V^e concile du Latran adopte la constitution *Cum tam divino* sur « l'hérésie de la simonie »¹⁰³, prévoyant qu'une élection simoniaque est nulle. Pie IV, en 1562, promulgue la bulle *In eligendis ecclesiarum praelatis*, qui interdit la création de cardinaux laïcs, souvent nommés pour des impératifs familiaux et politiques. Les paris sur les conclaves sont aussi interdits¹⁰⁴. Quatre modes d'élection sont désormais possibles : l'inspiration, le compromis, le scrutin et l'accession¹⁰⁵. On prévoit que les cardinaux ne peuvent administrer d'argent pendant la période électorale et on réaffirme l'importance de la stricte clôture et de l'*incommunicado* pendant la période électorale : tout intrus au conclave sera expulsé « ignominieusement » et « les lettres ou autres signes de convention que l'on reçoit ou que l'on envoie sont défendues sous peine de la déposition de la dignité, même cardinalice, et de l'excommunication majeure, dont l'absolution est réservée au pape seul »¹⁰⁶.

Si les cardinaux ne peuvent communiquer avec l'extérieur *pendant* le conclave, rien n'interdit toutefois à un cardinal de communiquer à ses collègues une demande qu'il aurait reçue de son souverain *auparavant*. C'est ainsi qu'en vue du conclave de 1590 — et dans le contexte de la rivalité franco-espagnole — Philippe II d'Espagne établit une liste de candidats non grata (aussi appelée *exclusive*) et une liste de candidats souhaités (*inclusive*). Cela marquera le début de la longue tradition de la *ius exclusivae* des grandes puissances catholiques, un droit qui ne sera jamais reconnu officiellement mais qui sera toujours respecté en pratique. Dans les faits, on permettra

¹⁰¹ Voir ZIZOLA, *Il conclave: storia e segreti*, 93.

¹⁰² Ibid., 92.

¹⁰³ Voir G. DUMEIGE et al. (dir.), *Latran V et Trente*, Histoire des conciles œcuméniques, n° 10, Paris, Orante, 1975, 417.

¹⁰⁴ Les parieurs — ou *scudi* — avaient d'ailleurs eu l'opportunité de suivre les conclaves en détail, notamment, en 1549, à cause du relâchement du secret. Il arrivait que les conclavistes et les cardinaux eux-mêmes prennent des paris. Voir BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 173-174.

¹⁰⁵ L'accession était une méthode permettant aux électeurs de reporter leur vote sur un autre candidat — sans même attendre le prochain tour de scrutin — dans la mesure où leur candidat n'avait pas atteint la majorité requise.

¹⁰⁶ Voir BARBIER DE MONTAULT, *Étude historique et canonique*, 68. Voir aussi FERNÁNDEZ, *El sistema electivo*, 206-207.

au cardinal de la couronne¹⁰⁷ de l'utiliser une fois par conclave, avant le vote final.

Comme l'acclamation et l'accession — qui se faisaient de façon verbale — permettaient au pouvoir politique de vérifier si les cardinaux d'une nation avaient bien suivi le mot d'ordre de leur chef de faction, ce procédé est aboli en 1621, par la bulle *Aeterni Patris* de Grégoire XV¹⁰⁸. Pour la même raison est introduit le vote par bulletin secret¹⁰⁹. Grégoire en profite aussi pour accélérer le tempo de l'élection en faisant passer le nombre de votes d'un à deux par jour, donnant ainsi moins de temps aux chefs de faction pour s'organiser. Sans s'en prendre explicitement à la *ius exclusivae*, un siècle plus tard Clément XIV rappelle aux cardinaux qu'ils doivent « se dégager de toutes considérations mondaines », notamment des « intercessions des princes »¹¹⁰. Mais rien n'y fait, les exclusives seront utilisées avec plus ou moins de régularité jusqu'à la fin du XIX^e siècle.

La perte des États pontificaux fait que le conclave de 1878 se passe dans un relatif désintérêt des puissances catholiques à son égard. On aurait d'ailleurs pu croire que s'en était fini de la tradition des interventions directes des nations catholiques. Dans ce contexte, l'exclusive de l'empereur d'Autriche à l'encontre du cardinal Rampolla, en 1903, apparaît comme un coup de tonnerre dans un ciel bleu. Élu au terme de ce conclave, Pie X prohibe rapidement et surtout explicitement « le prétendu Veto d'exclusive, comme toute autre forme d'ingérence, d'intervention et d'intercession que n'importe quelle couronne, nation ou gouvernement, sous quelque prétexte que ce soit, pourrait vouloir exercer à l'avenir lors de l'élection du Chef suprême de l'Église »¹¹¹. La constitution apostolique *Commissum nobis* prévoyait aussi

¹⁰⁷ Cardinal élevé au cardinalat sur la recommandation du souverain et qui est engagé par lui afin de défendre les intérêts nationaux lors du conclave. Voir F. BAUMGARTNER, *Behind Locked Doors: A History of the Papal Elections*, New York, Palgrave Macmillan, 2003, 150.

¹⁰⁸ Voir BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 175. L'année suivante, cette bulle sera complétée par *Decet Romanum Pontificem* qui insistera davantage sur la dimension liturgique du conclave, histoire de se distancier encore davantage de la dimension politique.

¹⁰⁹ Voir ZIZOLA, *Il conclave: storia e segreti*, 119. Jusqu'à Pie XII, il y avait cependant un mécanisme qui permettait de voir si l'élu avait voté pour lui.

¹¹⁰ L. LECTOR (pseud.), *Le conclave : origines, histoire, organisation, législation, ancienne et moderne [...]*, Paris, P. Lethielleux, 1894, 134. Cette exhortation de *Apostolus officium* sera notamment renouvelée par Pie IX en 1871 dans la bulle *In hac sublimi*, sans que le droit à l'exclusive soit clairement mentionné. Voir PHAM, *Heirs of the Fisherman*, 78 et FERNÁNDEZ, *El sistema electivo*, 217.

¹¹¹ Constitution apostolique sur le veto civil dans l'élection du Pontife romain *Commissum nobis* (20 janvier 1904), dans *Pii X Pontificis Maximi Acta*, III (1908), traduite dans P. CHENAUX, *Pie XII, diplomate et pasteur*, Paris, Cerf, 2003, 57.

une peine d'excommunication *latae sententiae* contre tout cardinal fautif. S'il faisait l'objet de pressions politiques, un cardinal pouvait désormais invoquer l'impossibilité absolue dans laquelle il se trouvait d'intervenir au nom d'un état.

La même année et dans le même esprit, Pie X publie la constitution *Vacante Sede Apostolica*. Celle-ci fait en sorte que — pour la première fois — le secret du conclave devient perpétuel¹¹². Ces deux normes — l'interdiction de l'exclusive et le secret perpétuel — sont intimement liées : non seulement l'exclusive est interdite mais il sera désormais impossible à un pouvoir externe de vérifier les faits et gestes d'un cardinal, afin de voir notamment si une exclusive a été prononcée ou non. Comme certains le font remarquer, les conclaves qui se sont déroulés depuis l'adoption de ces règles ont été parmi les plus libres depuis l'Empire romain¹¹³.

Tout en respectant le secret, nous savons que certains cardinaux ayant participé aux conclaves de 1914 et 1922 ont conservé par devers eux le compte des votes¹¹⁴. En 1945, Pie XII renforce encore le secret du conclave par la consitution *Vacantis Apostolicae Sedis* dans laquelle il prévoit que non seulement les bulletins de vote seront brûlés, mais aussi tous les documents des électeurs relatifs au déroulement du conclave¹¹⁵. Il renforce aussi la clôture du conclave par l'interdiction des moyens de communications que sont le téléphone et le télégraphe¹¹⁶. Finalement, Pie XII porte la majorité minimale des voix à 2/3 plus un, afin de s'assurer que l'élu ne l'ait pas été par son propre vote. Depuis ce temps, les bulletins ayant servi au vote secret n'ont plus besoin d'être personnalisés¹¹⁷. En 1962, dans la constitution *Summi Pontificis electio*¹¹⁸, Jean XXIII reviendra sur ces dispositions afin de faire en sorte que les documents du conclave ne soient plus brûlés mais plutôt donnés au camerlingue afin que celui-ci les dépose aux

¹¹² PIE X, Constitution apostolique sur la vacance du Siège apostolique et l'élection du Pontife romain *Vacante Sede Apostolica* (25 décembre 1904), n. 53, dans *Pii X Pontificis Maximi Acta*, III (1908), 250-301.

¹¹³ Voir ZIZOLA, *Il conclave: storia e segreti*, 185.

¹¹⁴ Ibid., 187. Par ailleurs, d'autres cardinaux donneront des informations sur le conclave, des années après sa tenue. Voir PHAM, *Heirs of the Fisherman*, 119 et BAUMGARTNER, « I Will Observe Absolute and Perpetual Secrecy », 177.

¹¹⁵ PIE XII, Constitution apostolique sur la vacance du Siège apostolique et l'élection du Pontife romain *Vacantis Apostolicae Sedis* (8 décembre 1945), n. 92, dans AAS, 38 (1946), n. 87.

¹¹⁶ Ibid., n. 64.

¹¹⁷ FERNÁNDEZ, *El sistema electivo*, 224.

¹¹⁸ JEAN XXIII, Lettre apostolique en forme de *motu proprio* édictant des normes en cas de vacance du Siège apostolique *Summi Pontificis electio*, 5 septembre 1962, dans AAS, 54 (1962), 632-640.

archives¹¹⁹. Il prévoit aussi que le secret peut être levé sur permission du pontife¹²⁰.

En 1970, Paul VI abolit, avec le *motu proprio* *Ingravescentem aetate*¹²¹, le droit de vote des cardinaux de plus de 80 ans. En 1975, il complète cette législation par la constitution *Romano Pontifici eligendo*¹²² en précisant que les octogénaires peuvent toutefois continuer de participer aux congrégations préalables aux conclaves, lesquelles sont aussi couvertes par le secret. Vraisemblablement en lien avec la préservation du secret¹²³, Paul VI renforce encore la clôture en interdisant que les cardinaux soient accompagnés de conclavistes, ces serviteurs personnels des cardinaux. Il est de nouveau prévu que tous les documents soient brûlés et qu'un seul registre des votes soit déposé aux archives. La télévision et la presse sont interdite dans l'enceinte du conclave.

2.3 — La législation actuelle

Les normes actuelles relatives à l'élection du pape sont prévues dans la constitution apostolique *Universi Dominici Gregis*¹²⁴, promulguée par le pape Jean-Paul II en 1996 et modifiée par les *motu proprio* de Benoît XVI *De electione romani pontificis*¹²⁵, en 2007, et *Normas nonnullas* en 2013¹²⁶. La notion du secret y est centrale : on y fait référence à 25 reprises dans

¹¹⁹ Ibid., n. 16.

¹²⁰ Ibid., nn. 6 et 16.

¹²¹ PAUL VI, Lettre apostolique en forme de *motu proprio* définissant l'âge des cardinaux en lien avec leur office *Ingravescentem aetatem*, 21 novembre 1970, dans AAS, 62 (1970), 810-813.

¹²² PAUL VI, Constitution apostolique sur la vacance du Siège apostolique et l'élection du Pontife romain *Romano Pontifici eligendo*, 1^{er} octobre 1975, dans AAS, 67 (1975) (=RPE), 609-645.

¹²³ Voir P. MAJER, « *Universi Dominici gregis*: la nueva normativa sobre la elección del Romano Pontífice », dans *Ius Canonicum*, 36 (1996), 684 (=MAJER, « La nueva normativa »).

¹²⁴ JEAN-PAUL II, Constitution apostolique sur la vacance du Siège apostolique et l'élection du Pontife romain *Universi Dominici gregis*, 22 février 1996, dans AAS, 93 (1996) (=UDG).

¹²⁵ BENOÎT XVI, Lettre apostolique *motu proprio* sur quelques changements dans les normes pour l'élection du Pontife romain *De aliquibus mutationibus in normis de electione Romani Pontificis*, 11 juin 2007, dans AAS, 99 (2007). Celle-ci visait à rétablir la majorité qualifiée des 2/3 dans le cas d'un conclave prolongé. Jean-Paul II avait prévu, dans UDG n. 75, que la majorité simple pourrait éventuellement suffire si l'impasse perdurait.

¹²⁶ BENOÎT XVI, Lettre apostolique *motu proprio* sur quelques modifications aux normes relatives à l'élection du Pontife romain *Normas nonnullas*, 22 février 2013, dans AAS, 105 (2013) (=NN).

l'ensemble du document. Sur cette question, le document reprend pour l'essentiel les normes déjà existantes. Toutefois, la construction en 1978 de la *Domus Sanctae Marthae* — où logent les cardinaux pendant le conclave — fait en sorte que le lieu de l'élection et celui de la résidence des électeurs sont maintenant différents, ce qui a rendu nécessaire certaines précisions.

Dans son préambule, *UDG* évoque l'indépendance du processus électoral et la qualité de l'expérience spirituelle des électeurs pour expliquer l'importance du secret du conclave. À cet effet, Jean-Paul II mentionne que le choix du pape est considéré comme une acte *sacré* s'effectuant *sous le regard de Dieu seul*. L'isolement des électeurs — tout comme la liturgie du conclave — sont présentés dans la constitution comme des moyens permettant *d'accueillir les motions intérieures de l'Esprit Saint*.

2.3.1 — La clôture et l'incommunicado

La clôture du conclave est probablement le moyen le plus évident de préservation du secret de l'élection¹²⁷. À compter du début de l'élection, la *Domus Sanctae Marthae*, la Chapelle Sixtine et les lieux destinés aux célébrations liturgiques des électeurs ne sont accessibles qu'aux électeurs et aux personnes nécessaires au bon fonctionnement des opérations¹²⁸. Parmi ces personnes pourraient se trouver du personnel médical, un secrétaire, des liturgistes, des confesseurs, du personnel de cuisine, de ménage et des techniciens¹²⁹. Un cardinal peut en sortir avant la fin du conclave mais s'il le fait, il ne peut y être réadmis à moins d'en être sorti pour maladie ou pour un autre motif qui, aux yeux de la majorité des électeurs, apparaît grave¹³⁰.

Une deuxième clôture, beaucoup plus stricte, touche la Chapelle Sixtine, où se déroulent les actes de l'élection proprement dite. La constitution prévoit que celle-ci est « totalement isolée »¹³¹, de manière à préserver le secret absolu sur « tout ce qui y sera fait ou dit, en rapport d'une manière ou d'une autre, directement ou indirectement avec l'élection »¹³². L'étanchéité de la clôture est renforcée par un contrôle technique afin de s'assurer

¹²⁷ Voir J.J.M. FOSTER, « The Election of the Roman Pontiff: an Examination of Canon 332 §1 and Recent Special Legislation », dans *The Jurist*, 56 (1996), 696.

¹²⁸ *NN*, n. 43.

¹²⁹ *UDG*, nn. 42 et 55. *UDG* et *NN*, n. 46.

¹³⁰ *Ibid.*, n. 40.

¹³¹ *Ibid.*, n. 51.

¹³² *Ibid.*

qu'aucun système d'enregistrement ou de reproduction clandestin n'ait été installé¹³³.

La clôture est doublée d'un *incommunicado*. *UDG* prévoit que les électeurs ne peuvent, sauf exception, communiquer avec l'extérieur.

Les Cardinaux électeurs, depuis le début des actes de l'élection jusqu'à ce qu'elle soit accomplie et annoncée publiquement, s'abstiendront d'entretenir des correspondances épistolaires, téléphoniques ou par d'autres moyens de communication avec des personnes étrangères au cadre où se déroule cette élection, sauf en raison d'une nécessité urgente et prouvée, dûment reconnue par la congrégation particulière mentionnée au n. 7. La même congrégation a compétence pour admettre la nécessité et l'urgence, pour les Cardinaux grand Pénitencier, Vicaire général pour le diocèse de Rome et Archevêque de la Basilique vaticane, de communiquer avec leurs services respectifs.¹³⁴

Cette nouvelle disposition apporte un certain assouplissement, puisque chaque communication faite par un cardinal autorisé¹³⁵ devait auparavant se faire par écrit et être approuvée par le secrétaire et les gardes du conclave¹³⁶. Les cardinaux électeurs devant maintenant se déplacer de leur lieu de résidence au lieu du scrutin, il est interdit d'entrer en contact avec eux pendant leur déplacement¹³⁷. Si, d'aventure, quelqu'un entrait en contact avec les cardinaux pendant cette période, il est interdit d'entrer en conversation avec eux¹³⁸.

2.2.2 — *Le secret perpétuel*

La constitution renforce les dispositions précédentes en matière de secret perpétuel. En préambule, *UDG* mentionne qu'un des buts de celle-ci est de maintenir « le plus rigoureux secret sur tout ce qui concerne directement ou indirectement les actes mêmes de l'élection »¹³⁹. Le secret sera scellé par trois serments, deux prêtés par les cardinaux et un autre par le personnel du conclave.

La constitution précédente prévoyait un serment par lequel les cardinaux participant aux congrégations préparatoires juraient « *de garder inviolablement*

¹³³ *UDG* et *NN*, n. 51.

¹³⁴ *UDG*, n. 44.

¹³⁵ Le Pénitencier, le Vicaire général pour le diocèse de Rome et l'Archevêque de la Basilique vaticane continuent d'exercer leur office pendant la vacance du Siège.

¹³⁶ Voir *RPE*, nn. 56 et 57.

¹³⁷ *UDG*, n. 43.

¹³⁸ *Ibid.*, n. 45.

¹³⁹ *Ibid.*, préambule.

le secret sur toutes et chacune des choses qui auront été faites ou décidées dans les congrégations des cardinaux pour l'élection du nouveau Pontife »¹⁴⁰. Le serment établit maintenant que les cardinaux doivent « maintenir scrupuleusement le secret sur tout ce qui a rapport de quelque manière que ce soit avec l'élection du Pontife Romain »¹⁴¹. Cela clarifie le fait que ce qui est couvert par le secret n'est pas tant le déroulement des congrégations elles-mêmes que ce qui touche l'élection¹⁴².

Les cardinaux électeurs prêtent de nouveau un serment au début de l'élection. Ce dernier est sans doute le plus intéressant puisqu'il donne des indications importantes tant sur le secret que sur sa raison d'être.

Nous tous et chacun de nous, Cardinaux électeurs présents à cette élection du Souverain Pontife, promettons, faisons le vœu et jurons d'observer fidèlement et scrupuleusement toutes les prescriptions contenues dans la Constitution apostolique du Souverain Pontife Jean-Paul II, *Universi Dominici gregis*, datée du 22 février 1996. De même, nous promettons, nous faisons le vœu et nous jurons que quiconque d'entre nous sera, par disposition divine, élu Pontife Romain, s'engagera à exercer fidèlement le *munus Petrinum* de Pasteur de l'Église universelle et ne cessera d'affirmer et de défendre avec courage les droits spirituels et temporels, ainsi que la liberté du Saint-Siège. Nous promettons et nous jurons surtout de garder avec la plus grande fidélité et avec tous, clercs et laïcs, le secret sur tout ce qui concerne d'une manière quelconque l'élection du Pontife Romain et sur ce qui se fait dans le lieu de l'élection et qui concerne directement ou indirectement les scrutins ; de ne violer en aucune façon ce secret aussi bien pendant qu'après l'élection du nouveau Pontife, à moins qu'une autorisation explicite en ait été accordée par le Pape lui-même ; de n'aider ou de ne favoriser aucune ingérence, opposition ni aucune autre forme d'intervention par lesquelles des autorités séculières, de quelque ordre et de quelque degré que ce soit, ou n'importe quel groupe, ou des individus voudraient s'immiscer dans l'élection du Pontife Romain¹⁴³.

Au seuil de l'élection, ce serment est le plus solennel puisqu'il prend ici la forme d'un vœu. Il s'agit donc, à proprement parler, d'un engagement dont Dieu est à la fois le témoin et le bénéficiaire¹⁴⁴. L'engagement porte d'abord sur le respect de l'ensemble des dispositions de *UDG*. Plusieurs de celles-ci

¹⁴⁰ *RPE*, n. 46.

¹⁴¹ *UDG*, n. 12.

¹⁴² Cette précision permet d'éviter des doutes et cas de conscience inutiles. Voir MAJER, « La nueva normativa », 710.

¹⁴³ *UDG*, n. 53.

¹⁴⁴ « Le vœu, c'est-à-dire la promesse délibérée et libre faite à Dieu d'un bien possible et meilleur, doit être accompli au titre de la vertu de religion », *CIC* c. 1191 §1. « Le serment, c'est-à-dire l'invocation du nom divin comme témoin de la vérité, ne peut être prêté qu'en vérité, avec discernement et selon la justice », *CIC* c. 1199 §1.

touchent directement au secret : à celles que nous avons déjà évoquées s'ajoutent les interdictions de recevoir la presse quotidienne ou un périodique, d'écouter des émissions radiophoniques ou de regarder la télévision¹⁴⁵, d'introduire dans les lieux où se déroulent les actes de l'élection des appareils techniques servant à enregistrer¹⁴⁶ et de conserver les notes en relation avec le résultat de chaque scrutin, lesquelles doivent être brûlées en même temps que les bulletins¹⁴⁷.

Le serment réunit en l'espace de quelques phrases trois concepts intimement liés entre eux : la défense des droits et de la liberté du Saint-Siège, la prohibition de l'ingérence extérieure et le respect du secret. Comme certains l'ont fait remarquer¹⁴⁸, on en comprend que le secret n'est pas une fin en soi mais plutôt un moyen d'assurer une élection libre de toute interférence.

En comparant ce serment avec celui que le personnel du conclave doit prêter (NN, n. 48), nous remarquons que la violation du secret n'est pas sanctionnée de la même façon. Dans le serment que doit prêter le personnel du conclave, Benoît XVI a introduit une référence à l'excommunication *latae sententiae* en cas de violation du secret, peine qui est aussi évoquée ailleurs dans *UDG*¹⁴⁹. Ainsi, le bris du secret est considéré comme un délit majeur, impliquant la peine la plus lourde prévue par le droit canonique. Toutefois, une telle sanction automatique n'est pas prévue dans *UDG* pour la violation du secret par les électeurs¹⁵⁰.

D'aucuns avancent que cela s'explique par le fait que le législateur a constaté l'inefficacité de l'excommunication infligée aux électeurs, puisque celle-ci n'affecte pas leur droit de continuer à participer au conclave¹⁵¹. Pourtant, *UDG* prévoit des cas d'excommunication pour les cardinaux électeurs¹⁵²

¹⁴⁵ *UDG*, n. 57.

¹⁴⁶ *Ibid.*, n. 61.

¹⁴⁷ *Ibid.*, n. 71.

¹⁴⁸ C.f. K. MARTENS, « Tu es Petrus, et super hanc petram aedificabo Ecclesiam meam: An Analysis of the Legislation for the Vacancy of the Apostolic See and the Election of the Roman Pontiff », dans *The Jurist*, 73 (2013), 71. Voir aussi G. TREVISAN, « Osservare il segreto secondo la costituzione *Universi Dominici gregis* », dans *Quaderni di diritto ecclesiale*, 22 (2009), 286 (=TREVISAN, « Il segreto »).

¹⁴⁹ Voir *UDG*, n. 58.

¹⁵⁰ La norme générale du c. 1399 *CIC* pourrait cependant trouver application : « la violation d'une loi divine ou canonique peut être punie, et alors d'une juste peine seulement, lorsque la gravité spéciale de la violation réclame une punition ». Voir TREVISAN, « Il segreto », 289.

¹⁵¹ *Ibid.*

¹⁵² La simonie (*UDG*, n. 78), l'ingérence politique (*UDG*, n. 80) ou encore les promesses ou les pactes (*UDG*, n. 81).

même si celle-ci n'affecte pas non plus le droit des cardinaux à prendre part au conclave.

La différence se situe plutôt dans le fait que les fautes entraînant l'excommunication ont elles-mêmes un caractère secret de par leur nature (la simonie par exemple) ou du fait qu'elles surviennent *pendant* le conclave, qui est lui-même protégé par le secret. Si un tel fait était avéré pendant le conclave, la remise de la peine par le nouvel élu pourrait se produire rapidement et confidentiellement, voire avant même la fin de la clôture du conclave. À l'opposé, le bris du secret est par définition une faute pouvant avoir un caractère public. Le simple soupçon d'une telle faute pourrait faire planer le doute sur le fait qu'un cardinal soit excommunié. En plus du scandale lié à une telle situation, cela pourrait créer de la confusion sur sa capacité à exercer son office¹⁵³. À une sanction automatique et publique, *UDG* a préféré la *discretio*.

Nous avons vu que le développement des normes entourant le secret du jury et du conclave présente des similarités, notamment l'apparition tardive du secret perpétuel et son resserrement récent. Nous verrons maintenant que, même de nos jours, les normes entourant le secret du conclave et du jury se recoupent sous plusieurs aspects, l'une et l'autre institution faisant face à des défis parfois semblables.

3 — Une perspective comparée des normes canoniques et de common law

Après avoir examiné le développement des normes entourant le secret des délibérations du jury et du conclave, nous les mettons en comparaison dans deux perspectives, soient celles de leur contenu objectif et de leurs effets respectifs. Nous examinerons par la suite les perspectives liées au secret dans un contexte de médiatisation grandissante.

3.1 — Des normes similaires avec des accents particuliers

Le conclave et le jury sont appelés à prendre une des décisions les plus importantes de leur système juridique respectif. Sauf exception, le verdict ou

¹⁵³ De fait, « À l'excommunié il est défendu: 1° de participer de quelque façon en tant que ministre à la célébration du Sacrifice de l'Eucharistie et aux autres cérémonies du culte quelles qu'elles soient; 2° de célébrer les sacrements ou les sacramentaux, et de recevoir les sacrements; 3° de remplir des offices ecclésiastiques, des ministères ou n'importe quelle charge, ou de poser des actes de gouvernement », *CIC* c. 1331 §1.

le choix du pape ne s'imposent pas d'emblée : ils reposent souvent sur des faits complexes et mettent en jeu des intérêts contraires. Ils sont sans appel et doivent être acceptés comme tels. La similarité du défi explique certaines similarités de fonctionnement. Afin de mettre en lumière ces similarités et leurs limites, nous distinguerons trois phases dans les processus de décision collective en cause : la phase préliminaire, la phase de délibération et la phase suivant la décision. Nous comparerons les normes pour chacune de ces phases.

3.1.1 — *La phase préparatoire*

Le conclave et le procès avec jury comprennent tous deux une phase préparatoire à la délibération. Dans le cas du procès, il s'agit de la présentation de la preuve. C'est la phase la plus spectaculaire et la plus longue. Il s'agit d'un processus public où tous les faits pertinents à la cause sont divulgués et analysés par les avocats et les témoins, dans le cadre d'un processus contradictoire. Dans les pays de *common law*, le caractère public est inhérent à la nature même du procès pénal. Les jurés et le public ont accès aux mêmes informations, ce qui a l'avantage de préparer le public à recevoir le verdict, puisqu'il aura été à même d'assimiler les faits ayant conduit à la décision.

Dans le cas du conclave, le principe est fort différent. Lors des congrégations préparatoires, les cardinaux discutent des enjeux qui leur apparaissent importants à la veille de l'élection. Contrairement au procès, les congrégations préparatoires au conclave sont secrètes en ce qui concerne la décision éventuelle, soit l'élection. Il est donc impossible pour le public d'avoir accès aux enjeux identifiés par les électeurs. Cela s'explique par le fait que, contrairement au procès, les principaux acteurs de cette phase sont aussi ceux qui prendront la décision éventuelle, soit les cardinaux électeurs. Rendre public le contenu intégral des congrégations risquerait de faire de l'élection un exercice de relations publiques¹⁵⁴. Dans le cas du jury, cette phase se termine par les directives qui lui sont données par le juge. Pour le conclave, ces directives consistent en la lecture de la constitution *UDG*.

3.1.2 — *La phase de la délibération et de la décision*

Les règles relatives à la séquestration et à l'*incommunicado* lors de la deuxième phase du processus — soit celle des délibérations et du vote — sont

¹⁵⁴ Cette difficulté pourrait être partiellement contournée si une instance ecclésiastique indépendante des électeurs avait comme rôle de mettre en lumière, pour la compréhension des fidèles, les principaux éléments caractérisant l'état de l'Église.

essentiellement les mêmes, qu'il s'agisse du jury ou du conclave. La séquestration existait dès le départ dans les deux institutions. Dans le cas du conclave, c'est même elle qui lui a donné son nom et son identité propre. L'*incommunicado* total est cependant plus récent dans le cas du conclave. Nous avons vu, par exemple, que les journaux pouvaient y entrer jusqu'à une époque relativement récente. De nos jours, les deux institutions se ressemblent sur cette question.

Le jury nécessite généralement l'unanimité du vote alors que c'est la règle de la majorité qualifiée qui prévaut au conclave. Cela induit une différence importante quant au secret du vote. Dans le cas d'un verdict unanime, on sait automatiquement comment chacun des jurés a voté. Dans le cas du conclave, la décision individuelle de chacun des électeurs ne sera jamais connue du public. Si chaque cardinal électeur aura tôt fait de se rallier à la décision prise par le conclave, aucun n'aura à porter publiquement le poids de son vote personnel. En ce sens, le secret de cette phase est plus complet dans le cas du conclave que du jury. Outre ceci, ce qui distingue les deux processus lors de cette phase n'est pas tant le contenu des normes relatives au secret que leur interprétation et leur application. Il revient au juge de prendre les décisions qui s'imposent quant à l'application des normes entourant la séquestration et l'*incommunicado* du jury. Ainsi, il existe toujours une autorité extérieure au jury possédant un pouvoir discrétionnaire et à qui il revient d'évaluer les circonstances pour déterminer la marche à suivre, le cas échéant. Celle-ci n'existe pas pour le conclave, l'enjeu de celui-ci étant précisément de remplacer celui qui exerce l'autorité suprême.

3.1.3 — La phase suivant la décision

L'après-décision, tant dans le cas du jury que du conclave, est marqué par l'obligation du secret perpétuel. Dans le cas du conclave, il est impossible de rapporter quoique ce soit qui se rapporte à l'élection ou encore d'en conserver des notes. Pour le jury, le secret perpétuel s'applique à tout ce qui se rapporte au verdict *et* qui n'a pas été rapporté en salle d'audience. Ainsi, l'essentiel des faits du procès n'est pas soumis au secret, ce qui impose un fardeau beaucoup moins lourd aux jurés qu'aux cardinaux électeurs.

En ce qui concerne la levée du secret perpétuel, les règles sont aussi différentes. Dans le cas du conclave, il est possible pour le pape de lever cette obligation. *UDG* y fait référence à deux reprises en utilisant des expressions différentes : à moins qu'une « autorisation explicite n'ait été accordée par le Pape lui-même »¹⁵⁵ ou qu'une « permission particulière et expresse n'ait été

¹⁵⁵ *UDG*, n. 53.

concédée par le Pontife lui-même »¹⁵⁶. Dans le cas du jury, la logique est inversée. Si le secret devait être levé, il ne s'agirait pas d'une permission à la suite d'une demande adressée en ce sens mais plutôt d'une obligation qui serait faite à un juré à titre de témoin dans une enquête pour entrave à la justice, donc dans un cadre bien précis et prédéfini. Ainsi donc, il apparaît que le cardinal électeur a une plus grande maîtrise du secret puisque s'il souhaite communiquer des informations soumises au secret, il a un forum pour en faire la demande. Par ailleurs, il ne peut être contraint de témoigner sans une intervention directe du pape. Ceci dit, *UDG* ne précise pas si la permission accordée en vertu des nn. 53 et 60 doit avoir été formulée par l'électeur lui-même ou par une autre partie.

Le secret perpétuel est relativement récent dans le cas du conclave alors qu'il existe depuis longtemps dans le cas du jury ; nous avons vu qu'il en est de même pour l'*incommunicado* intégral. Il semble ainsi qu'avec le temps les règles entourant le secret du conclave tendent à se rapprocher de celles du jury. Cela pourrait s'expliquer par le fait que — bien que les deux institutions datent sensiblement de la même époque — les verdicts sont infiniment plus nombreux que les élections papales. De telle sorte que la *common law* a pu développer son expertise à un rythme accéléré, tant au niveau du contenu des normes que de la compréhension de leur portée, élément auquel nous nous attarderons maintenant.

3.2 — Des effets voulus, d'autres à explorer

Tant dans le cas du conclave que du jury, le secret tend à préserver un espace de liberté pour la délibération. Il a aussi comme effet de préserver le public de toute information qui pourrait entacher sa confiance. Finalement, le cas du jury nous montre que le secret des délibérations a aussi comme effet de créer *de facto* un espace aux frontières du droit.

3.2.1 — Le développement de paradigmes distincts

Au début du II^e millénaire, le souci de distinguer le profane du divin produira deux effets en sens contraire. D'une part, les clercs remettent le verdict civil entre les mains des laïcs. D'autre part, les laïcs sont écartés de l'élection papale au profit du clergé romain. Parallèlement, la délibération se présente comme une alternative à l'intervention divine directe pour baser une décision aussi importante que celle d'un verdict ou de l'élection du pape.

¹⁵⁶ Ibid., n. 60.

L'ordalie — qui a précédé le verdict par jury — invitait Dieu à manifester concrètement sa décision, les parties s'en remettant à la *Judicio dei*. Le premier chef de l'Église a lui aussi été désigné par une intervention divine, soit par le Christ lui-même¹⁵⁷. À cette intervention divine directe a succédé celle de l'inspiration divine ou quasi-divine. L'expression « jugement de Dieu et du peuple », a été utilisée dans le cas du jury, et « jugement de Dieu et consentement de tous », dans le cas de la désignation du pape. L'idée était la même : un groupe décidant unanimement — et rapidement — d'une question aussi délicate que l'élection du pape ou d'un verdict, ne pouvait agir que par inspiration divine. Dans le cas du jury, nous avons vu que c'est le verdict unanime et quasi-spontané comme *phénomène* qui était recherché au départ. Il en était de même du côté de l'Église, où la désignation du pape s'est longtemps faite par *acclamationem seu inspirationem*¹⁵⁸.

À ce paradigme a succédé celui de la délibération, où deux référentiels se sont développés en parallèle. Le système judiciaire a opté pour le *raisonnement logique*. Le verdict y est présenté comme le résultat d'un syllogisme dont les seules prémisses sont la loi et les faits présentés en preuve. Si les faits reprochés se sont produits et qu'ils correspondent à la définition d'un crime, le jury est invité à rompre un verdict de culpabilité¹⁵⁹. De leur côté, les cardinaux électeurs sont appelés à faire un exercice de *discernement* pour le choix du prochain pontife. Il s'agit d'un exercice intellectuel mais aussi spirituel qui consiste à être attentif aux *motions de l'Esprit-Saint*¹⁶⁰. Ce discernement s'alimente à la méditation¹⁶¹, à l'échange¹⁶² et à la prière¹⁶³. Bien qu'ils soient de nature distincte, le raisonnement logique et le discernement exigent tous deux comme condition de base une certaine liberté intérieure.

¹⁵⁷ Pierre aurait par la suite lui-même désigné ses premiers successeurs. Voir ALLEN, *Conclave*, 77 et PHAM, *Heirs of the Fisherman*, 42.

¹⁵⁸ Bien que tombée en désuétude depuis longtemps, cette méthode n'a été officiellement abolie qu'en 1996. Voir *UDG*, n. 62.

¹⁵⁹ Il s'agit d'une règle générale qui souffre toutefois l'exception de la *nullification* du jury.

¹⁶⁰ Cf. *UDG*, préambule.

¹⁶¹ *UDG* évoque les méditations prononcées dans les congrégations préalables (n. 13), celle suivant l'*extra omnes* (n. 52) et les exhortations spirituelles en cas d'élection prolongée (n. 74).

¹⁶² Tout échange sur l'élection avant la vacance du Siège est interdit mais *UDG* permet celle-ci une fois la vacance commencée (n. 81) et l'encourage même en cas d'élection prolongée (n. 74).

¹⁶³ Pensons à la *Messe votive* « *pro eligendo Papa* » (n. 49), l'invocation de l'assistance de l'Esprit-Saint par le chant du *Veni Creator* (n. 50), les prières de l'*Ordo rituum conclavis* (n. 54), la célébration quotidienne de l'Eucharistie (n. 73), un temps réservé à la prière en cas d'impasse (n. 74) et la prière des fidèles accompagnant la tâche des électeurs (n. 84).

3.2.2 — *Le secret comme garant de la liberté*

Les chapitres précédents nous ont montré que la principale raison d'être des normes entourant la claustration et le secret est la préservation de la liberté. Que ce soit pour le conclave ou le jury, le raisonnement est le suivant : la justesse de la décision implique une liberté de pensée et d'action qui est favorisée par la claustration et le secret. Le secret est donc associé à la qualité de la décision à prendre. Et il l'est de plusieurs façons.

La première est la protection contre l'influence extérieure. On comprendra facilement qu'un jury faisant l'objet de pressions provenant du public ou encore que les cardinaux électeurs soumis à une *exclusive* perdront la sérénité et la distance nécessaires pour accomplir fidèlement le devoir. Dans le cas du jury, la jurisprudence reconnaît que la principale fonction de la claustration est la préservation de l'influence et des pressions extérieures. Pour le conclave, la claustration des électeurs a d'abord été un état de fait voulu par les cardinaux eux-mêmes afin de les protéger de la foule et des pressions politiques, avant de devenir une obligation imposée par les autorités civiles et le pape. Corollaire de la claustration, l'*incommunicado* prévient toute communication — donc toute possibilité d'influence — entre ceux qui délibèrent et l'environnement extérieur. Finalement, l'introduction du secret perpétuel du conclave visait clairement à empêcher qu'une puissance extérieure puisse vérifier, après les faits, si l'émissaire s'était bien chargé de la tâche qu'on lui aurait confiée.

Ces mesures favorisent aussi la qualité de la décision par l'établissement de conditions internes favorisant la délibération. La claustration et l'*incommunicado* obligent d'abord les acteurs à se concentrer sur leurs délibérations, les possibilités de distraction étant réduites. Ceci a comme conséquence de hâter la décision, ce qui était d'ailleurs la raison première de l'instauration de la clôture. Par ailleurs, le secret perpétuel favorise aussi la qualité des échanges et de la réflexion qui en résulte. Le fait que personne ne puisse rapporter les propos des jurés est perçu comme favorisant la franchise des échanges et la liberté de parole, chacun sachant que ses propos ne pourront être interprétés, critiqués ou tournés en ridicule par des personnes extérieures au jury. Par ailleurs, le fait qu'il n'y ait pas d'explication à donner sur la décision prise, la façon dont elle l'a été ou encore sur sa propre position pendant les délibérations, permet aux jurés et aux électeurs de ne pas se sentir redevables envers qui que ce soit. Dans le cas du conclave on peut aussi avancer que le discernement gagne à une certaine forme de discrétion : « le secret aide au discernement pour l'action. Agir dans le secret c'est d'abord agir de façon authentique, c'est-à-dire dans la vérité de celui qui

cherche à faire plus qu'à dire, à vivre en profondeur plus qu'à se satisfaire de la superficialité, en somme à être avant de paraître »¹⁶⁴.

3.2.3 — *Le secret au service d'une présomption*

La liberté nécessaire au jury et au conclave demande certaines dispositions intérieures qui peuvent être indépendante de l'ingérence externe. L'amitié, l'antipathie, l'ambition, les préjugés, la dynamique politique du groupe, l'influence démesurée que tend parfois à prendre certains détails — surtout dans un contexte d'expérience collective intense — peuvent aussi être des obstacles à l'exercice de la logique et du discernement. Le juge demande d'ailleurs au jury d'examiner la preuve « avec un esprit ouvert, sans préjugé ou sympathie à l'égard de quiconque »¹⁶⁵. Il est aussi demandé aux cardinaux électeurs de faire preuve de « docilité à l'action de l'Esprit Saint »¹⁶⁶ et de :

ne pas se laisser guider, dans l'élection du Pontife, par la sympathie ou l'aversion, ou influencer par des faveurs ou par des rapports personnels envers quiconque, ou pousser par l'intervention de personnalités en vue ou de groupes de pression, ou par l'emprise des moyens de communication sociale, par la violence, par la crainte ou par la recherche de popularité. Mais, ayant devant les yeux uniquement la gloire de Dieu et le bien de l'Église, après avoir imploré l'aide divine, qu'ils donnent leur voix à celui qu'ils auront jugé plus capable que les autres, même hors du Collège cardinalice, de gouverner l'Église universelle avec fruit et utilité¹⁶⁷.

Il n'est pas toujours évident, s'il est même possible, de réunir toutes les conditions qui permettent d'assurer un exercice intellectuel ou spirituel qui soit entièrement libre. Et dans le cas du jury, même si l'exercice était fait librement, les jurés pourraient fort bien arriver aux mêmes conclusions par des chemins tout à fait différents. Ainsi, nous pouvons penser que le raisonnement logique univoque des jurés et le discernement des électeurs sont une ligne d'horizon de la délibération, un idéal sans cesse à poursuivre. Mais pour qu'ils puissent susciter l'adhésion et éviter la remise en question, le verdict et l'élection doivent pouvoir jouir de la présomption qui leur est offerte par leur cadre de référence respectif, soit qu'il y a bien eu exercice de logique ou de discernement.

¹⁶⁴ S. DUFOUR, « Secret, silence, sacré. La trinité communicationnelle de l'Église catholique », dans *Journal for Communication Studies*, vol. 6, n° 2 (2013), 146 (=DUFOUR, « Secret, silence, sacré »).

¹⁶⁵ Voir *Modèle de directives au jury*, art. 3.6.

¹⁶⁶ FRANÇOIS, Discours à l'occasion d'une audience à tous les cardinaux, 15 mars 2013, dans *AAS*, 105 (2013), 376.

¹⁶⁷ *UDG*, n. 83.

La jurisprudence en *common law* a clairement nommé¹⁶⁸ le danger de mettre au jour des informations qui remettraient en cause la fiction du raisonnement logique univoque, à la base de la confiance du public dans le système de jury. La comparaison des normes et de leur justification nous incite à penser que le secret a aussi cette fonction collatérale dans le cas du conclave. Le discernement relève d'une expérience intérieure qui peut être difficile à saisir de l'extérieur, surtout lorsque ses composants sont rapportés isolément et hors contexte. À cet égard, le secret évite des malentendus quant à la dynamique ayant conduit au résultat du scrutin. Il permet de préserver la présomption à l'effet que l'élection soit le résultat d'un discernement authentique. Cela est particulièrement précieux, l'histoire démontrant que l'élection du pape tend à constituer un point de fracture lorsque l'Église est traversée par des tensions importantes.

Si le conclave, de par sa nature religieuse, implique déjà une notion de mystère que le secret permet de préserver, il ne faudrait pas croire que le verdict du jury échappe de nos jours à cette logique de l'ineffable qui a marqué ses débuts. La décision du jury bénéficie du mystère et de la sécurité associés au secret¹⁶⁹. Le secret du conclave et du jury permet ainsi de conserver une aura favorisant le respect et la déférence nécessaires au caractère définitif de la décision.

3.2.4 — *Un espace aux frontières du droit*

Ultimement, le secret joue un rôle dans la préservation de l'unité de l'Église et de la confiance du public dans le système de justice. Mais peut-être a-t-il aussi une autre fonction, celle de régulateur *extra-juridique*.

Dans le cas du jury, il existe une possibilité de *nullification* qui consiste à rendre un verdict d'acquiescement même s'il est contraire aux faits et au droit. Il s'agit ni plus ni moins de « la décision secrète d'un jury de refuser d'appliquer la loi »¹⁷⁰. Cette possibilité n'est sanctionnée par aucune loi et ne fait l'objet d'aucune directive au jury. Le juge rappelle même aux jurés que leur seule tâche est de rendre un verdict conforme au droit et aux faits. Il est même interdit à l'avocat de la défense d'évoquer la possibilité de *nullification*. Pourtant, la jurisprudence tolère cette possibilité *de facto*. Un peu comme si la *common law* acceptait que le droit ne puisse couvrir toute la réalité. Cette possibilité est liée au secret puisque ce dernier empêche d'investiguer ou même de connaître cet éventuel « dépassement de la légalité ». C'est ainsi qu'il la rend possible.

¹⁶⁸ Voir note 60.

¹⁶⁹ Voir A. MARKOVITZ, « Jury Secrecy during Deliberations », dans *Yale Law Journal*, 110 (2001 2000), 1505.

¹⁷⁰ Voir note 55.

Le secret perpétuel du conclave crée *de facto* un espace laissant aux électeurs la possibilité de prendre les décisions qui s'imposent en fonction de la situation vécue. Tout comme les directives du juge indiquent au jury qu'il doit se contenter d'appliquer la loi, la constitution *UDG* rappelle aux électeurs que leur rôle se limite à celui d'interpréter les règles, non pas de les changer ou encore « d'en dispenser même partiellement »¹⁷¹. Et elle le fait à bon droit, l'histoire démontrant qu'il existe un lien entre l'unité de l'Église et le respect des formalités légales garantissant la légalité et la légimité de l'élection du pape. Ceci étant dit, n'est-il pas souhaitable qu'en certaines circonstances exceptionnelles¹⁷² les électeurs s'autorisent collectivement à prendre les décisions qui s'imposent pour le bien de l'Église et ultimement celui des âmes, surtout si celles-ci n'ont pas d'impact sur la validité de l'élection ? Le secret permet au conclave comme au jury d'être le dernier rempart contre l'imperfection des lois, tout en évitant le scandale public de l'illégalité.

3.3 — Le secret à l'ère de l'information

S'il présente plusieurs avantages, le secret n'en constitue pas moins un défi à la culture actuelle, notamment dans un contexte d'« imputabilité » gouvernementale accrue et d'omniprésence des médias. Les gouvernements sont de plus en plus appelés à rendre des comptes sur les résultats atteints et sur la façon dont ils l'ont été, notamment afin de prévenir les abus de pouvoir et de s'assurer du respect des principes d'équité et de bonne intendance¹⁷³. Au nom de l'« imputabilité » gouvernementale, le secret des délibérations du jury est d'ailleurs remis en cause par plusieurs, notamment aux États-Unis et en Australie¹⁷⁴. Le secret empêcherait d'examiner la façon dont le pouvoir judiciaire est exercé. Bien que l'Église ne soit pas une démocratie, elle vit dans un environnement qui exerce inévitablement une pression vers une transparence qui n'est pas toujours compatible avec son éthos traditionnel¹⁷⁵ et qui ne rend pas toujours compte de sa culture propre¹⁷⁶.

¹⁷¹ *UDG*, n. 4.

¹⁷² Par définition, celles-ci ne peuvent pas être toutes prévues. Nous en évoquerons tout de même une dans la section qui suit.

¹⁷³ VÉRIFICATRICE GÉNÉRALE DU CANADA, *Rapport annuel*, décembre 2002, par. 9.20.

¹⁷⁴ J. HUNTER, « Jury Deliberations and the Secrecy Rule: The Tail That Wags the Dog », dans *Sydney Law Review*, 35 (2013).

¹⁷⁵ Voir à ce sujet DUFOR, « Secret, silence, sacré ».

¹⁷⁶ Du point de vue de l'Église, les médias utilisent une herméneutique politique qui cadre mal avec la réalité ecclésiale. Voir BENOÎT XVI, Discours tenu à l'occasion de la rencontre avec le clergé de Rome, 14 février 2013, https://w2.vatican.va/content/benedict-xvi/fr/speeches/2013/february/documents/hf_ben-xvi_spe_20130214_clero-roma.html (25 février 2018).

Par ailleurs, la multiplication des chaînes de nouvelles en continu, des sites Web et des médias sociaux font en sorte que l'appétit pour la nouvelle est en augmentation constante. Dans ce contexte, le secret du conclave et du jury pose un défi à la culture médiatique ambiante. Mais l'inverse est aussi vrai : cette omniprésence pose un défi à l'intégrité même du conclave et du jury. À un point tel que les normes entourant le secret ont du être renforcées. Pensons à la criminalisation du bris du secret par les jurés ou au renforcement de l'*incommunicado* au conclave. La jurisprudence reconnaît que le secret perpétuel a aussi comme avantage de prévenir le harcèlement des jurés par les médias. Jusqu'à un certain point, le secret du conclave a aussi cet effet pour les cardinaux électeurs.

Dans le cas du conclave, le défi posé par les médias est tel qu'on peut se demander si ceux-ci ne sont pas devenu un nouveau pouvoir bénéficiant d'un droit officieux d'*exclusive*. Peuvent-ils influencer les électeurs en fonction de certains enjeux qu'ils auraient identifiés et martelés comme étant incontournables ? Sans être impossible, il serait difficile pour le conclave d'élire un candidat que les médias auraient clairement stigmatisé, sachant que ceux-ci sont devenus incontournables dans l'accomplissement du ministère pétrinien. Dans l'avenir, cela pourrait poser des problèmes concrets quant au déroulement du conclave. Par exemple, qu'advierait-il si éclatait *pendant* le conclave un scandale à l'égard d'un *papabile*¹⁷⁷ ? Si ce scandale s'emparaient des médias traditionnels et des médias sociaux, les cardinaux électeurs devraient-ils prendre connaissance de leur contenu malgré l'*incommunicado* portant aussi sur les médias¹⁷⁸ ? Si oui, quel poids accorder à ces reportages, dans un contexte où les médias eux-mêmes ne semblent pas à l'abri de la manipulation ?¹⁷⁹ Nous croyons qu'en de telles circonstances, il reviendrait au collège des électeurs de prendre les décisions qui s'imposent.

Cette situation pourrait être exacerbée par la façon dont risquent de se dérouler les conclaves à l'avenir. Dans le cas du jury, la période où le secret s'applique est relativement courte puisque la phase préparatoire — la présentation de la preuve — se fait en public. Les médias ont donc pu rapporter, analyser et commenter les faits présentés en preuve au fur et à mesure de l'évolution du procès. Jusqu'à l'annonce du verdict, seule la période des délibérations du jury interrompt temporairement ce flux de nouvelles. Et

¹⁷⁷ Il ne s'agit pas d'une vue de l'esprit : quelques jours avant le conclave de 2013, le cardinal O'Brien qui s'apprêtait à prendre part au conclave a fait l'objet d'un scandale sexuel l'ayant forcé à démissionner.

¹⁷⁸ *UDG*, n. 57.

¹⁷⁹ Pensons notamment à *Facebook*, qui a reconnu que des intérêts étrangers avaient acheté massivement de la publicité visant à influencer la dernière campagne électorale américaine.

encore, il est d'usage pendant cette période que les médias rapportent les faits qui n'ont pu être présentés au jury pendant le procès, le juge ayant refusé qu'ils soient mis en preuve.

À l'inverse, la phase préparatoire du conclave n'offre traditionnellement que peu de matière neuve aux médias en lien avec l'élection, à l'exception notable des cérémonies funèbres entourant le décès du pape. Celles-ci sont riches en images et en symboles. De plus, l'homélie prononcée lors des obsèques offre un des rares moments d'ouverture sur les préoccupations de l'Église, à la veille du conclave. Un conclave se tenant dans un contexte de démission prive dorénavant les médias de cette possibilité. Dans un tel contexte, la tentation sera grande pour eux de combler ce fossé. La fausse nouvelle, l'interprétation, le commentaire éditorial, les revendications des groupes d'intérêts, l'insistance sur les défis et les scandales, les attentes diverses des fidèles et l'examen approfondi du passé de *papabiles*¹⁸⁰ seront autant de façons de le faire. De nos jours, cette période débutant par la démission du pape et l'annonce de son successeur apparaît particulièrement critique pour l'indépendance de l'Église à l'égard du pouvoir médiatique¹⁸¹.

Afin que l'Église puisse préserver adéquatement son indépendance, de nouvelles approches pourraient être tentées afin de lui permettre de prendre l'initiative, tout en préservant fondamentalement le secret de l'élection. Lors des congrégations générales ayant précédé le dernier conclave, les cardinaux américains avaient eu le réflexe de tenir un point de presse quotidien afin d'en partager certains éléments de contenu ; ils y avaient finalement renoncé à l'invitation de leurs collègues. Quelles que soient les pistes explorées, l'enjeu est d'éviter que l'Église ne soit à la remorque des médias comme elle l'a parfois été du pouvoir politique. L'afflux des médias au conclave n'est pas seulement un risque mais aussi une opportunité : peu d'occasions sont aussi propices à la communication directe entre l'Église et le monde.

En comparant les normes entourant le secret du conclave et du jury, nous avons vu comment celles-ci permettent de répondre aux défis auxquelles font face ces institutions. Pensons notamment à la préservation de leur liberté et de leur indépendance face au pouvoir politique mais aussi, plus récemment,

¹⁸⁰ Voir notamment P. PULLELA, « Vatican accuses italian media of false reports ahead of conclave », 23 février 2013, dans *Reuters World News*, <https://www.reuters.com/article/us-pope-resignation-media/vatican-accuses-italian-media-of-false-reports-ahead-of-conclave-idUSBRE91M08W20130223> (25 février 2018).

¹⁸¹ Voir J. BERRY, « Rome: The Media and the Conclave », 7 mars 2013, dans *Global Post*, <https://www.pri.org/stories/2013-03-07/rome-media-and-conclave> (25 février 2018).

au pouvoir médiatique. Successeurs et héritiers de l'intervention divine directe, le jury et le conclave ne peuvent jouer leur rôle que dans la mesure où ils conservent une aura les plaçant au-dessus de la banalité et des vicissitudes. Le secret permet ainsi de maintenir voilé ce qui doit l'être. Par ailleurs, il a comme effet de laisser aux participants la marge de manœuvre nécessaire afin de corriger les imperfections de la loi dans un contexte de décision importante, délicate et définitive.

Conclusion

La comparaison des normes du conclave et du jury montre que le secret est intimement lié au rôle même de ces institutions. L'examen du développement des normes entourant le secret montre qu'il est intimement associé à l'indépendance et à la liberté du conclave et du jury. Par ailleurs, la *common law* a mis en évidence que le secret aide aussi à préserver le consensus social qui est à la base même de ce type d'institutions. Les décisions collectives les plus graves, les plus conséquentes et les plus solennelles revêtent une dimension symbolique qui mérite d'être protégée. Les règles entourant le secret ne procèdent pas d'un cynisme mystificateur mais au contraire d'un regard lucide sur les enjeux liés à une décision délicate et sans appel.

Ultimement, le secret est au service d'enjeux fondamentaux : l'unité de l'Église et la confiance du public dans le système de justice. C'est ce qui explique qu'au cours des huit derniers siècles, le secret ait été si intimement lié à l'évolution du conclave et du jury. Ceci étant dit, nous avons vu que les règles entourant le secret ont évolué afin de s'adapter aux défis de l'histoire et aux besoins respectifs de l'Église et de la *common law*. Il conviendra aussi de voir comment ces normes seront appliquées dans l'avenir, afin de continuer à répondre à ces besoins. À titre d'exemple, serait-il possible de rendre accessibles à la recherche scientifique certaines informations dénominalisées, qui sont actuellement protégées par le secret des délibérations? Cela permettrait ainsi de mieux comprendre la dynamique des groupes confinés et, plus précisément, celle qui est propre aux délibérations du jury. Du côté de l'Église, il semble que pour les cardinaux électeurs le conclave puisse être l'occasion d'une expérience spirituelle particulièrement forte, ayant nourri leur vie de foi¹⁸². Tout en préservant le

¹⁸² La cardinaux Poupard et Schönborn en ont fait mention, à l'issue du dernier conclave. Voir notamment G. GALEAZZI, « Poupard: I experienced the most intense emotions of my life in

secret électoral, est-il possible que certains éléments particuliers de cette expérience puissent être communiqués pour des raisons d'ordre pastoral ? Si oui, comment ?

the Sistine Chapel », 12 mars 2013, dans *La Stampa*, <http://www.lastampa.it/2013/03/12/vaticaninsider/eng/world-news/poupard-i-experienced-the-most-intense-emotions-of-my-life-in-the-sistine-chapel-VExArWIVOthdnq3GdZJJnI/pagina.html> (25 mars 2018) et J. BRIGHAM, « Pope Francis Elected after Supernatural 'Signs' in the Conclave, says Cardinal », 14 mai 2013, dans *The Telegraph*, <http://www.telegraph.co.uk/news/worldnews/the-pope/10056994/Pope-Francis-elected-after-supernatural-signs-in-the-Conclave-says-Cardinal.html> (27 février 2018).

LE SUICIDE ASSISTÉ (EUTHANASIE) ET L'ACCÈS AUX SACREMENTS : CONSIDÉRATIONS CANONIQUES ET PASTORALES

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RÉSUMÉ — L'A. a été sensibilisée à la souffrance existentielle en fin de vie des fidèles qui contemplent ou choisissent le suicide assisté ou l'euthanasie et qui demandent les sacrements de fin de vie. Les ministres sont confrontés à un dilemme : administrer, remettre à plus tard ou refuser les sacrements demandés. L'A. regarde les sources législatives qui donnent naissance à des considérations canoniques et pastorales, examine les canons pertinents aux fidèles et à leur réception des sacrements et les droits des fidèles aux sacrements. Elle considère quelques réponses des évêques canadiens à la question de l'accès aux sacrements par les fidèles qui considèrent ou choisissent le suicide assisté ou l'euthanasie ainsi qu'un lieu parallèle qui propose une approche à ces fidèles, une approche basée sur la gradualité pastorale et non sur une gradualité doctrinale. En conclusion, l'A. pose quelques questions pour susciter une réflexion au sujet de l'accès aux sacrements, au sujet du cheminement qu'un fidèle qui se sent lésé dans ses droits d'accès aux sacrements pourrait prendre pour revendiquer ses droits et au sujet de l'invitation adressée possiblement à l'Église à lire le suicide assisté et l'euthanasie comme un signe des temps (*GS* n^{os} 1-4). L'A. propose une démarche de compassion et de miséricorde, un processus de discernement, d'accompagnement et d'intégration de la fragilité pour en arriver à la décision au sujet de l'administration des sacrements demandés, une approche qui pourrait favoriser une culture de la vie et non une culture de la mort par suicide assisté ou euthanasie.

SUMMARY — The A. was sensitized to the existential suffering which arises at the end of the life of the faithful who contemplate or chose assisted suicide or euthanasia and who request the sacraments of the end of life. Ministers are confronted with a dilemma: to administer, to postpone or to refuse the sacraments. The A. looks at legislative sources which give rise to these canonical and pastoral considerations, examines the canons which are pertinent to the faithful and their reception of sacraments and the rights of the faithful to sacraments. She considers some responses provided by

Canadian bishops to these questions which relate to access to sacraments by the faithful who are contemplating or have chosen assisted suicide or euthanasia as well as a parallel source which proposes an approach to these faithful, an approach based on pastoral gradualness and not on a doctrinal gradualness. In conclusion, the A. asks a few questions to stimulate reflection about access to sacraments, about the options available to the faithful who believe they have been wronged in their right and about the invitation that is possibly being addressed to the Church, in the A.'s view, to consider assisted suicide and euthanasia as a sign of the times (*GS* n^{os} 1-4). The A. proposes a compassionate and merciful approach, a process of discernment, accompaniment and integration of weakness to arrive at a decision to administer, postpone or refuse administration of the requested sacraments, an approach which could support a culture of life rather than a culture of death by assisted suicide or euthanasia.

Introduction

La question suivante suscite une réflexion canonique, théologique et pastorale, cette question qui survient soit en fin de vie ou à d'autres moments critiques de la vie : est-ce que le fidèle du Christ qui considère ou qui choisit le suicide assisté ou l'euthanasie¹ peut avoir accès aux sacrements de l'Eucharistie (Viatique), de la pénitence et de l'onction des malades? Pour placer cette réflexion en contexte, voici une étude de cas représentative de la réalité sur le terrain actuellement où les ministres accompagnent les malades qui contemplent leur fin de vie, réfléchissent sur diverses options ce qui, au Canada, inclut la possibilité d'avoir recours à l'euthanasie.

Étude de cas

Monsieur H., âgé de 49 ans, est catholique. Il vit avec un cancer terminal. Il demande de cesser tous les traitements en cours. Il recevra l'euthanasie dans trois semaines en présence de sa famille. Il demande de voir le chapelain

¹ Étant donné que les statistiques sur l'aide médicale à mourir pour la période du 1^{er} janvier au 31 décembre 2017 indiquent 1086 décès attribuables à l'euthanasie (décès administrés par des cliniciens) et 1 décès auto administré (suicide assisté), nous avons cru bon alléger et faciliter la lecture de ce texte en optant pour le mot euthanasie. Lorsque le mot euthanasie est utilisé, le lecteur comprendra que nous traitons aussi du suicide assisté sauf dans le cas des documents du Magistère où il n'est pas question de suicide assisté. <https://www.canada.ca/fr/sante-canada/services/publications/systeme-et-services-sante/aide-medicale-mourir-rapport-interim-juin-2018.html> (20 octobre 2018).

(cc. 564-568)² parce qu'il désire recevoir les « derniers sacrements ». L'équipe de soins informe le chapelain du plan de M. H. de recevoir l'euthanasie. Le chapelain est confronté à un dilemme : 1) accepter de visiter M. H. et lui démontrer de la sollicitude pastorale dans le contexte de sa demande des sacrements; 2) refuser de visiter M. H. puisqu'il a choisi de recevoir l'euthanasie dans trois semaines. Devant ce carrefour, le chapelain semble avoir deux choix possibles :

- 1) M.H. a déjà choisi l'euthanasie. Le chapelain décide qu'il n'a rien à offrir à ce client étant donné la décision prise en faveur de l'euthanasie. Il refuse de le visiter.
- 2) Le chapelain réfléchit et discerne à la lumière de l'Esprit. Il se souvient du ministère de guérison, de compassion et de miséricorde de Jésus, ce ministère qu'il a légué à ses disciples. Il accepte de visiter M. H.

La souffrance existentielle en fin de vie des fidèles qui contemplent ou choisissent le suicide assisté ou l'euthanasie et qui, dans ce contexte, demandent les sacrements de fin de vie, soit l'Eucharistie (le Viatique), la pénitence et l'onction des malades³, crée une tension palpable dans le secteur des soins de santé. Les ministres dans les milieux de soins de santé sont confrontés à un dilemme : administrer, remettre à plus tard ou refuser les sacrements demandés.

Ce ministère est important dans l'Église. Toutefois le Code de droit canonique ne fait pas allusion à ce ministère. Au cours de l'histoire récente, des efforts ont été mis en place pour faire un lien entre le ministère des soins de santé catholique et des normes canoniques appliquées et interprétées afin d'adapter la loi à des situations contemporaines⁴. Nous espérons que ce travail sera une contribution à la réflexion sur l'application pratique des normes de droit canonique au vécu contemporain des fidèles qui considèrent ou choisissent le l'euthanasie. Nous regarderons les sources législatives qui donnent naissance à des considérations canoniques et pastorales. Nous examinerons les canons pertinents aux fidèles et la réception des sacrements et les droits des fidèles aux sacrements. Nous considérerons quelques réponses des évêques canadiens à la question de l'accès aux sacrements par les fidèles qui considèrent ou choisissent le suicide assisté ou l'euthanasie. Nous proposerons un

² Voir *Codex Iuris Canonici*, texte français *Code de droit canonique, texte officiel et traduction française*, préparé par la SOCIÉTÉ INTERNATIONALE DE DROIT CANONIQUE ET DE LÉGISLATIONS RELIGIEUSES COMPARÉES, Paris, Centurion, Tardy/Ottawa, CECC, 1984 (=CIC). Cette traduction est utilisée pour toutes les références subséquentes des canons du Code de 1983.

³ L'ordre des sacrements traités dans cet article est l'ordre dans lequel ces sacrements se présentent dans le Code de Droit canoniques de 1983 et non, effectivement, dans l'ordre suggéré pour la réception de ces sacrements par un fidèle malade ou en fin de vie.

⁴ Voir F. MORRISEY, « Trustees and Canon Law », dans *Health Progress*, vol. 83, no. 6 (2002), 12.

lieu parallèle qui suggère une approche à la personne qui vit une situation « irrégulière », c'est-à-dire la personne qui considère ou demande l'euthanasie.

1 — Sources législatives et des considérations canoniques et pastorales

La personne baptisée souffrant d'une maladie grave voire mortelle peut envisager l'option de l'euthanasie. Plongée dans le désespoir que la souffrance intolérable peut susciter, la personne peut effectuer une demande pour recevoir l'euthanasie. L'Église a le devoir de rechercher une rencontre avec cette personne malade⁵ qui demeure un fidèle du Christ à part entière (cc. 96 et 204), qui a des droits et des devoirs (cc. 204-223), tout particulièrement en ce qui a trait à l'aide provenant des sacrements (c. 213).

Depuis le XVII^e siècle, l'Église du Canada, par l'entremise des membres des congrégations religieuses et de laïcs engagés, répond à cette invitation à envelopper de son amour ceux et celles qui sont affligés par la maladie en qui l'Église reconnaît le visage de Jésus souffrant et à soulager cette souffrance⁶. Aujourd'hui l'Église « ne participe pas seulement à la bonne nouvelle de son Maître par sa fidélité à sa parole et le service de la vérité, mais elle participe également, par sa soumission pleine d'espérance et d'amour, à la force de son action rédemptrice, qu'il a exprimée et placée dans les sacrements [...] »⁷.

Nous traitons ici d'un dilemme canonique, théologique et pastoral d'actualité, vécu par des professionnels de la santé et des soins spirituels dans certaines Églises particulières du Canada, où les fidèles demandent les sacrements lorsqu'ils contemplent ou optent pour l'euthanasie. Regardons les sources législatives étatiques et ecclésiastiques qui donnent naissance à ces dilemmes canoniques et pastoraux.

Un courant international, qui, selon Doucet, « favorise une mort plus digne chez plusieurs malades qui vivaient leur fin de vie dans l'indignité »⁸,

⁵ Voir JEAN-PAUL II, Lettre apostolique sur le sens chrétien de la souffrance humaine *Salvifici doloris*, 11 février 1984 (=SD), n^{os} 3-4, dans AAS, 76 (1984) 202-203, traduction française dans DC, 81 (1984), 233.

⁶ Voir CONCILE VATICAN II, Constitution dogmatique sur l'Église *Lumen gentium*, 21 novembre 1964, dans AAS, 57 (1964), 5-75, traduction française dans *Vatican II, Fides*, 27.

⁷ JEAN-PAUL II, Lettre encyclique *Redemptor hominis*, 4 mars 1979 (=RH), n^o 20, AAS, 71 (1979), 309-310, traduction française dans DC, 76 (1979), 317-318.

⁸ H. DOUCET, *La mort médicale, est-ce humain?* Montréal, Médiaspaul, 2015 (=DOUCET, *La mort médicale, est-ce humain?*) 8.

s'impose depuis le dernier tiers du XX^e siècle. Ce courant conduit à un profond débat international sur la fin de vie et sur les diverses stratégies disponibles et contemplées pour assurer une mort dont les moyens d'y arriver sont choisis parmi diverses options. Le Canada ne s'est pas trouvé à l'abri de ce courant et de ces débats. L'Église du Canada n'est pas non plus demeurée à l'abri des dilemmes doctrinaux, théologiques, canoniques et éthiques qui en découlent. Nous connaissons le désir de l'Église de rendre le Christ présent au fidèle malade, vieillissant ou en danger de mort, surtout par le bien spirituel des sacrements, lorsque la souffrance peut donner naissance au découragement et au désespoir. Saint Jean-Paul II nous rappelle que c'est précisément sur ce chemin que l'Église doit venir à la rencontre de la souffrance : « L'Église, qui naît du mystère de la Rédemption dans la Croix du Christ, a le devoir de rechercher la rencontre avec l'homme d'une façon particulière sur le chemin de sa souffrance »⁹, une rencontre qui devrait inspirer la compassion et le respect « qui provient du besoin le plus profond du cœur comme aussi de l'impératif profond de la foi ».¹⁰ Dans un tel contexte, il risque d'y avoir de la confusion au sujet de la terminologie utilisée dans les débats, les écrits et les textes législatifs. Il serait bon d'éclairer notre réflexion en offrant trois définitions-clés.

Considérons d'abord l'euthanasie : un acte qui consiste à provoquer intentionnellement la mort d'autrui pour mettre fin à ses souffrances¹¹, par l'administration d'un médicament et ce, à la demande de la personne¹². Ensuite considérons le suicide assisté : le fait d'aider quelqu'un à se donner volontairement la mort en lui fournissant les renseignements ou les moyens nécessaires ou les deux¹³, lesquels moyens la personne peut choisir ou non d'utiliser pour se donner la mort¹⁴. Et enfin, considérons l'aide médicale à mourir : administrer à une personne, à sa demande, une substance qui cause sa mort (c'est-à-dire l'euthanasie); prescrire ou fournir à une personne, à sa demande, une substance afin qu'elle se l'administre elle-même et ainsi causer

⁹ SD, n° 3, AAS, 76 (1984), 202-203, DC, 81 (1984), 233.

¹⁰ SD, n° 4, AAS, 76 (1984), 203, DC, 81 (1984), 233.

¹¹ Voir M. BUTLER, et al., *L'euthanasie et l'aide au suicide au Canada*, publication n° 2010-68-F, Ottawa, Service d'information et de recherche parlementaires, Bibliothèque du Parlement, 15 février 2013 (=BUTLER, *L'euthanasie et l'aide au suicide*), 3, <https://bdp.parl.ca/content/lop/ResearchPublications/2010-68-f.pdf> (22 novembre 2017).

¹² Voir GOUVERNEMENT DU CANADA, *Contexte législatif : aide médical à mourir (projet de loi C-14 tel que sanctionné le 17 juin 2016)*, juin 2016 (=GOUVERNEMENT DU CANADA, *Contexte législatif : aide médicale à mourir*), <http://www.justice.gc.ca/fra/pr-rp/autre-other/amrs-adra/> (14 décembre 2017), 8.

¹³ Voir BUTLER, *L'euthanasie et l'aide au suicide*, 3.

¹⁴ Voir GOUVERNEMENT DU CANADA, *Contexte législatif : aide médical à mourir*, 8.

sa propre mort (c'est-à-dire le suicide assisté)¹⁵. Il faut aussi retenir les gestes ou les interventions qui ne sont pas considérés comme étant l'euthanasie : respecter la volonté de refuser un traitement ou de cesser un traitement qui n'apporte pas d'effets bienfaisants ou aucun soulagement; cesser ou ne pas initier un traitement chez une personne qui est mourante lorsque le fardeau du traitement dépasse les bienfaits escomptés et donner des médicaments pour soulager la douleur de la personne mourante dont l'effet involontaire est d'écourter la vie¹⁶.

1.1 — Contexte législatif au Canada: la Loi C-14

Ce débat soulève une question éthique fondamentale : quelle est la responsabilité de la société de promouvoir la vie de ses membres et de respecter leur liberté¹⁷? Ce débat s'est déplacé à la Cour suprême du Canada et a conduit au développement de la Loi C-14.

En 1993, Sue Rodriguez demandait l'autorisation pour son médecin afin qu'il puisse « mettre en place des moyens technologiques qu'elle pourrait utiliser, quand elle perdra la capacité de jouir de la vie, pour se donner elle-même la mort au moment qu'elle choisirait »¹⁸. Dans l'arrêt *Rodriguez*, la Cour suprême du Canada statue le rejet de la demande afin de ne pas « dévaloriser la valeur de la vie humaine en permettant d'ôter la vie »¹⁹. La Cour suprême limitait ainsi la liberté des personnes malades et souffrantes qui ne pouvaient pas se donner la mort ou recevoir de l'aide pour arriver à cette fin. L'autorisation de l'euthanasie et de l'aide au suicide pour les personnes malades et vulnérables n'était pas perçue comme faisant la promotion de la vie, une valeur et un principe sacré au cœur de la démocratie canadienne²⁰ à l'époque.

En 2011, la société fait de l'autonomie individuelle une valeur presque absolue²¹. L'Association des libertés civiles de la Colombie-Britannique

¹⁵ GOUVERNEMENT DU CANADA, Projet de loi C14, Définitions, article 241.1., https://www.parl.ca/content/Bills/421/Government/C-14/C-14_4/C-14_4.pdf, (30 juin 2017), 5.

¹⁶ ASSEMBLÉE DES ÉVÊQUES CATHOLIQUES DE L'ONTARIO, *L'euthanasie et l'aide au suicide*, <http://acbo.on.ca/fr/download/leuthanasie-et-laide-au-suicide/>, janvier 1996 (11 septembre 2018), 2.

¹⁷ DOUCET, *La mort médicale, est-ce humain?*, 93.

¹⁸ COUR SUPRÊME DU CANADA, *Rodriguez c. Colombie-Britannique* (Procureur général), 1993, 3, *Rodriguez c Colombie-Britannique* (Procureur général), [1993] 3 RCS 519, <https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/1054/index.do> (29 mars 2017).

¹⁹ Ibid., 41.

²⁰ Voir DOUCET, *La mort médicale, est-ce humain?*, 94.

²¹ Voir *ibid.*, 97.

questionne auprès de la Cour suprême de la Colombie-Britannique la constitutionnalité de deux articles du Code criminel : l'article 14 — « nul ne peut consentir à ce que la mort lui soit donnée par un autre » et l'alinéa 241(b) — « quiconque aide ou encourage quelqu'un à se donner la mort commet un acte criminel », lesquels deux articles sont responsables de la prohibition de l'aide à mourir. L'Association allègue que ces articles portent atteinte aux garanties juridiques contenues dans la *Loi Constitutionnelle de 1982, Partie I, Charte canadienne des droits et libertés*²². Dans l'arrêt *Carter* du 6 février 2015²³, la Cour suprême statue par un vote unanime que les dispositions visant à interdire l'aide médicale à mourir portent atteinte à la liberté et à la sécurité des personnes qui vivent avec des maladies graves et irrémédiables²⁴. La Cour conclut que ces dispositions risquent de priver du droit à la vie puisque des personnes pourraient s'enlever la vie prématurément en prévoyant leur incapacité d'effectuer ce geste lorsque les souffrances deviendront intolérables. La Cour conclut que la loi favorise l'objectif législatif fixé, c'est-à-dire d'empêcher une personne vulnérable de mettre fin à ses jours. Elle conclut aussi que la loi est à portée excessive.

Le projet de Loi C-14 est donc introduit au Parlement canadien. Cette loi est jugée offrir un équilibre entre l'autonomie des personnes qui désirent recevoir l'aide médicale à mourir et les intérêts des personnes vulnérables et de la société. Elle modifie le Code criminel afin de permettre aux médecins et aux infirmières praticiennes d'offrir cette aide aux personnes qui répondent aux critères d'admissibilité. Deux formes d'aide médicale à mourir sont permises : l'administration directe par un médecin ou une infirmière praticienne d'une substance provoquant la mort de la personne qui en a fait la demande, ou la remise ou la prescription par un médecin ou une infirmière praticienne d'une substance que la personne peut s'administrer elle-même pour provoquer sa mort. Le projet de loi C-14 qui décriminalise l'aide médicale à mourir reçoit la sanction royale le 17 juin 2016.

1.2 — La doctrine de l'Église sur l'euthanasie

L'Église nous offre plusieurs sources qui élaborent sa position sur la dignité des personnes et de la vie humaine et plus particulièrement sur

²² GOUVERNEMENT DU CANADA, *Loi constitutionnelle de 1982, Partie I, Charte canadienne des droits et libertés*, <http://laws-lois.justice.gc.ca/fra/Const/page-15.html> (12 décembre 2017).

²³ COUR SUPRÊME DU CANADA, *Carter c Canada (Procureur général)*, 2015 CSC 5, [2015] 1 RCS 331 [*Carter*], 6 février 2015 (= *Carter c. Canada*) 4, <https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/14637/index.do> (29 mars 2017).

²⁴ Voir GOUVERNEMENT DU CANADA, *Contexte législatif : aide médical à mourir*, 4.

l'euthanasie. Parmi ces sources il y a le *Catéchisme de l'Église catholique*²⁵ et la Lettre encyclique de Jean-Paul II à tous les évêques de l'Église catholique sur quelques questions fondamentales de l'enseignement moral de l'Église, *Veritatis splendor*²⁶. Deux documents présentent explicitement la position doctrinale de l'Église sur l'euthanasie : la Déclaration *Iura et bona* de la CDF sur l'euthanasie et sur l'observation d'un usage thérapeutique droit et proportionné des médicaments analgésiques²⁷ et la Lettre encyclique de Jean-Paul II, *Evangelium vitae*²⁸.

1.2.1 — La Déclaration sur l'euthanasie de la CDF

La Déclaration présente l'enseignement de l'Église sur ce qu'elle appelle le « problème »²⁹ de l'euthanasie. Elle ouvre sur un rappel de l'enseignement du Concile Vatican II, dans la Constitution pastorale sur l'Église du monde de ce temps *Gaudium et spes* au n° 27 qui déclare que tout ce qui s'oppose à la vie, incluant l'euthanasie, est, en vérité, infâme, corrompt la civilisation, déshonore la personne qui s'y livre et la personne qui la subit tout en insultant gravement l'honneur du Créateur³⁰. Déjà à l'époque où la Déclaration est écrite, la médecine réussissait à guérir et à prolonger la vie, ce qui occasionne en certains cas des problèmes moraux. Les fidèles se questionnent « avec angoisse sur le sens de la vieillesse extrême et de la mort [...] se demandent s'ils n'auraient pas le droit de se procurer, à eux ou à leurs semblables, une mort “douce” qui abrégerait leurs souffrances ou qui serait, à leurs yeux, plus conforme à la dignité humaine »³¹. Des conférences épiscopales dirigent ce questionnement vers la Congrégation pour la doctrine de la

²⁵ Voir *Catéchisme de l'Église Catholique*, Service des éditions, Conférence des évêques catholiques du Canada, Ottawa, 1993, n°s 2276-2279, (=CÉC), 466.

²⁶ JEAN-PAUL II, Lettre encyclique sur quelques questions fondamentales de l'enseignement moral de l'Église *Veritatis splendor*, 6 août 1993 (=VS), n°s 80-83, dans AAS, 85 (1993), 1183-1200, traduction française dans DC, 90 (1993), 901-944.

²⁷ Voir CONGRÉGATION POUR LA DOCTRINE DE LA FOI, Déclaration sur l'euthanasie et sur l'observation d'un usage thérapeutique droit et proportionné des médicaments analgésiques, 5 mai 1980 (=DE), dans AAS, 72 (1980), 542-552, traduction française dans DC, 62 (1980), 697-700.

²⁸ Voir JEAN-PAUL II, Lettre encyclique sur la valeur et l'inviolabilité de la vie humaine *Evangelium vitae*, 25 mars 1995 (=EV), dans AAS, 87 (1995), 401-522, traduction française dans DC, 77 (1995), 351-405.

²⁹ DE, dans AAS, 72 (1980), 542, DC, 62 (1980), 697.

³⁰ Voir CONCILE VATICAN II, Constitution pastorale sur l'Église dans le monde de ce temps *Gaudium et spes*, 7 décembre 1965 (=GS), n° 27, dans AAS, 58 (1966), 1047-1048, traduction française dans *Vatican II, Fides*, 198-199.

³¹ DE, dans AAS, 72 (1980), 543, DC, 62 (1980), 697.

foi, qui, aidée par des experts, prépare un document de réflexion. La signification de l'euthanasie retenue par la Déclaration est la suivante : une action ou une omission qui, de soi ou dans l'intention, donne la mort afin de supprimer ainsi toute douleur. La Déclaration réitère avec fermeté que personne ne peut faire un geste homicide pour soi ou pour un autre confié à sa responsabilité ni même y consentir. Un tel geste serait une violation de la loi divine et une offense à la dignité humaine³². Les demandes de mort de la part de grands malades ne devraient pas être comprises comme « l'expression d'une vraie volonté d'euthanasie; elles sont en effet presque toujours des demandes angoissées d'aide [...] ce dont a besoin le malade, c'est [...] de la chaleur humaine et surnaturelle [...] »³³.

1.2.2 — *Lettre encyclique de Jean-Paul II, Evangelium vitae*

La Lettre encyclique de Jean-Paul II sur la valeur et l'inviolabilité de la vie humaine, *Evangelium vitae*³⁴, publiée en 1995 répond à la demande unanime des cardinaux rassemblés en consistoire extraordinaire en avril 1991 pour regarder les grands problèmes de menaces à la vie. L'Encyclique affirme la vision chrétienne sur la valeur et la dignité de la vie humaine, de son inviolabilité et la condamnation par l'Église de la suppression de la vie, ces menaces à la vie fragile, vulnérable et sans défense, particulièrement la peine de mort, l'avortement, l'euthanasie et le suicide délibéré³⁵.

En 1995, l'incidence de l'euthanasie était beaucoup plus rare qu'aujourd'hui. Toutefois la position doctrinale de l'Église sur l'euthanasie, fondée sur la loi naturelle, enseignée par le magistère, n'a pas changée au cours des ans. *Evangelium vitae* présente le contenu doctrinal sur ce que le document appelle « le drame de l'euthanasie »³⁶. On entend par euthanasie une action ou une omission qui, de soi et dans l'intention, donne la mort afin de supprimer ainsi toute douleur³⁷.

Evangelium vitae propose la participation à la mission du Christ confiée à tous les disciples du Christ. Cette participation doit être continuée par une action pastorale d'accompagnement pour promouvoir une culture de la vie. La demande d'accompagnement, de solidarité et de soutien dans l'épreuve

³² Voir *ibid.*

³³ *Ibid.*

³⁴ Voir *EV*, dans *AAS*, 87 (1995), 401-522, *DC*, 77 (1995), 351-405.

³⁵ Voir *EV*, n° 3, dans *AAS*, 87 (1995), 404, *DC*, 77 (1995), 352.

³⁶ Voir *EV*, n°s 64-66, dans *AAS*, 87 (1995), 474-478, *DC*, 77 (1995), 384-385.

³⁷ Voir *EV*, n° 65, dans *AAS*, 87 (1995), 476, *DC*, 77 (1995), 385; voir aussi *LG*, n° 25, dans *AAS*, 57 (1965), 29, *Vatican II, Fides*, 54-55.

est un appel à l'aide pour continuer d'espérer, quand l'espoir semble disparaître.³⁸ L'invitation à promouvoir la culture de la vie provient directement de la mission d'évangélisation de l'Église, dont un moyen privilégié est la célébration des sacrements, qui sont les

signes efficaces de la présence et de l'action salvifique du Seigneur Jésus dans l'existence chrétienne : ils rendent les hommes participants de la vie divine, en leur assurant l'énergie spirituelle nécessaire pour saisir en toute vérité le sens de la vie, de la souffrance et de la mort. Grâce à une authentique redécouverte de la signification des rites et à leur juste mise en valeur, les célébrations liturgiques, surtout les célébrations des sacrements, seront toujours plus en mesure d'exprimer toute la vérité sur la naissance, la vie, la souffrance et la mort, en aidant à les vivre comme une participation au mystère pascal du Christ mort et ressuscité³⁹.

2 — Les obligations et les droits des fidèles concernant la réception des sacrements

La personne humaine incorporée au peuple de Dieu par le baptême devient un membre de l'Église du Christ (c. 204, §1) qui, selon Le Tourneau, a des droits et des obligations (c. 96) « en vue de la vocation à la sainteté et à la participation à l'unique mission de l'Église »⁴⁰. Nous regarderons d'abord les obligations des fidèles pour la réception des sacrements de l'Eucharistie, de la pénitence et de l'onction des malades. Ensuite, nous traiterons du droit des fidèles aux sacrements en général et en particulier à l'Eucharistie, à la pénitence et à l'onction des malades, et du devoir des ministres concernant l'administration des sacrements. Finalement, nous examinerons le droit des fidèles à l'aide spirituelle, particulièrement aux sacrements.

2.1 — Les obligations des fidèles pour la réception des sacrements

Le baptême produit un effet juridique chez le fidèle qui devient le sujet de droits et d'obligations dans l'Église. Cette section traitera des obligations des fidèles pour la réception des sacrements de l'Eucharistie, de la pénitence

³⁸ Voir EV, n° 67, dans AAS, 87 (1995), 479, DC, 77 (1995), 385.

³⁹ EV, n° 84, dans AAS, 87 (1995), 497, DC, 77 (1995), 393.

⁴⁰ D. LE TOURNEAU, « Quelle protection pour les droits et les devoirs fondamentaux des fidèles dans l'Église? », dans SJC, 28 (1994), 67.

et de l'onction des malades. Nous réfléchirons sur leur pertinence à la réception par les fidèles qui demandent l'euthanasie.

2.1.1 — *Le sacrement de l'Eucharistie (cc. 915 et 916)*

Le Seigneur lui-même adresse une invitation pressante au fidèle de le recevoir dans l'Eucharistie⁴¹. Toutefois, comme le dit Le Tourneau, « Le droit à communier n'est pas absolu. Comme tout droit, il peut se voir limité par des situations qui s'opposent à son exercice »⁴². Les canons 915 et 916 décrivent des situations dans lesquelles le fidèle est privé de recevoir l'Eucharistie et les obligations qui lui incombent pour recevoir le sacrement.

Le canon 915 s'applique directement au ministre du sacrement afin qu'il puisse discerner à qui il peut donner l'Eucharistie. Il s'applique indirectement au fidèle à qui il est défendu de recevoir le sacrement⁴³. Selon Huels, le ministre de l'Eucharistie est obligé de refuser le sacrement à un fidèle dont le péché grave est manifeste. Refuser l'Eucharistie à un fidèle lorsque le péché n'est pas connu publiquement porterait atteinte à la réputation du fidèle, une violation du canon 220. Le canon 915 s'applique à des péchés graves habituels, par exemple un médecin qui pratique régulièrement des avortements. Selon Huels, il ne s'applique pas dans le cas d'un seul péché grave même manifeste puisqu'il ne serait pas question d'obstination. L'obstination dont il est aussi question dans le canon 1007, est une réaction qui survient suite à de nombreux avertissements de l'autorité ecclésiale de cesser le comportement qui est à l'origine du péché grave. Sans ces avertissements non respectés, un refus de l'Eucharistie ne peut pas être basé sur l'obstination. Les avertissements donnés dans le for externe, soit verbalement ou par écrit, doivent clairement indiquer les conséquences de continuer le comportement répréhensible qui pourrait aller jusqu'au refus du sacrement. Le fidèle se voit devant le choix de changer ou de cesser ou non le comportement qui est à la source du péché grave pour éviter le refus public de l'Eucharistie et la possible perte de réputation associée à ce refus⁴⁴. Pour appliquer le canon 915, Huels suggère qu'il y ait un besoin urgent d'éviter un grave scandale public au sein de la communauté. Il conclut que ce canon ne devrait être

⁴¹ Voir *CÉC*, n° 1384, 298.

⁴² D. LE TOURNEAU, *La dimension juridique du sacré*, Montréal, Wilson & Lafleur, ltée, 2012 (= LE TOURNEAU, *La dimension juridique du sacré*), 319.

⁴³ Voir W. KOWAL, « The Non-Admission of the Divorced and Remarried Persons to Holy Communion: Canon 915 Revisited », dans *StC*, 49 (2015), 414.

⁴⁴ Voir J. HUELS, « Prohibition of Eucharist to Public Sinners (c. 915) », dans *CLSA Comm2* (=HUELS, « Prohibition of Eucharist to Public Sinners [c. 915] »), 1110-1111.

appliqué que lorsque le fidèle persiste avec obstination dans son péché grave et manifeste et que le bien commun de la communauté ecclésiale l'exige pour éviter un plus grand mal causé par un grave scandale. À la lumière de ces commentaires au sujet du c. 915, il nous semble que le ministre doit bien évaluer la situation du fidèle qui contemple ou qui a fait la demande pour l'euthanasie. Est-ce vraiment une situation où le fidèle doit se voir refuser l'Eucharistie? Est-ce que l'intention de considérer ou de poursuivre avec une demande pour l'euthanasie peut être considérée un péché grave habituel alors que le péché n'a pas encore été commis? Est-ce que l'obstination existe si le fidèle n'a pas reçu d'avertissement dans la forme d'une brève explication de l'enseignement de l'Église et n'a pas été invité à changer d'option? Est-ce que la contemplation ou la demande pour l'euthanasie est, en effet, manifeste et à risque de causer un scandale?

Le canon 916 s'applique au fidèle qui a l'intention de recevoir l'Eucharistie. Il s'applique aussi au ministre qui célèbre ou concélébre l'Eucharistie⁴⁵. Ce canon décrit l'évaluation que ce fidèle doit faire pour déterminer si, en conscience, il est digne de recevoir le sacrement et la restriction imposée sur le droit du fidèle de communier au corps du Christ lorsqu'il a conscience d'être en état de péché grave sans recourir auparavant à la confession sacramentelle ou faire un acte de contrition parfaite avant de communier, ce qui inclut la résolution de se confesser dès que possible. À la lumière de ce canon, est-ce que le fidèle qui contemple ou qui a fait la demande pour l'euthanasie, sans les lumières de l'enseignement de la part du ministre, peut se voir en conscience, indigne de ce sacrement parce qu'en état de péché grave qu'il n'a pas encore effectivement commis, lui qui fait la demande du sacrement de bonne foi, dans le contexte de sa vie de baptisé et sa vie de foi toujours active?

2.1.2 — *Le sacrement de la pénitence (cc. 987 et 988)*

Tout fidèle qui a les dispositions nécessaires a le droit de recevoir personnellement la grâce sacramentelle qui provient du sacrement de pénitence⁴⁶. Les canons 987 et 988 décrivent les obligations imposées au fidèle qui veut recevoir le sacrement de pénitence. Le canon 987 décrit les obligations

⁴⁵ Voir R. BURKE, « Canon 915: The Discipline Regarding the Denial of Holy Communion to Those Obstinate Persevering in Manifest Grave Sin », dans *Periodica de Re Canonica*, 96 (2007), 36.

⁴⁶ Voir JEAN-PAUL II, Lettre apostolique en forme de motu proprio sur certains aspects du sacrement de pénitence *Misericordia Dei*, 7 avril 2002 (=MisD), dans AAS, 94 (2002), 453, traduction française dans DC, 84 (2002), 452.

du fidèle pénitent qui veut bénéficier du remède salutaire c'est-à-dire être disposé à réprouver les péchés qu'il a commis, avoir le ferme propos de s'amender et se convertir à Dieu⁴⁷.

Selon Dufour, le canon 988 « précise le contenu de la confession pour que le pénitent participe effectivement et fructueusement à la célébration du sacrement »⁴⁸. Suite à un examen de conscience sérieux, le fidèle doit faire une confession intégrale individuelle et détaillée de tous les péchés graves selon leur nombre et leur espèce.

À la lumière de ces commentaires, il nous semble qu'il serait difficile pour le ministre d'évaluer si le fidèle qui contemple l'euthanasie réprouve le péché dont il pourrait être question puisque ce péché n'a pas encore été commis par le fidèle. Celui qui a fait la demande pour l'euthanasie peut devenir disposé à changer d'option et développer le ferme propos de s'amender à la lumière de l'enseignement reçu au cœur d'une rencontre remplie de sollicitude pastorale avec le ministre et ainsi ne pas commettre le péché grave que serait accepter l'euthanasie.

2.1.3 — *Le sacrement de l'onction des malades (cc. 1004-1007)*

Les canons 1004-1007 traitent de la question du fidèle à qui le sacrement de l'onction des malades peut être conféré. Il n'y a pas d'obligation de recevoir le sacrement mais plutôt le devoir moral⁴⁹. Le sacrement avive la foi et apporte un réconfort au fidèle soucieux d'affronter sa vie affectée par la maladie. Le fidèle puise une lumière pour porter la souffrance et trouver le courage pour vivre la maladie en communion avec le Christ⁵⁰. Le canon 1004 recommande la réception du sacrement comme possibilité et non comme obligation du fidèle qui est en danger de mort à cause de la maladie ou du vieillissement⁵¹. Le canon 1005 présente trois éléments de doute à évaluer avant d'administrer le sacrement : au sujet de l'usage de la raison du fidèle malade, au sujet de la gravité de la maladie du fidèle et au sujet du fait que le fidèle soit déjà décédé. S'il y a un doute, il y a une obligation d'administrer

⁴⁷ Voir *CÉC*, n^{os} 1430-1433, 307-308; n^{os} 1450-1460, 311-313; n^{os} 1490-1493, 319-320.

⁴⁸ B. DUFOUR, *Le sacrement de pénitence et le sacrement de l'onction des malades Commentaire des Canons 959-1007*, Paris, Éditions Tardy, 1989, 119.

⁴⁹ Voir D. LE TOURNEAU, *La dimension juridique du sacré*, 369.

⁵⁰ *Sacrements pour les malades : pastorale et célébrations*, Notes doctrinales et pastorales, n^o 4, 11-12; n^o 11, 13.

⁵¹ Voir CONCILE VATICAN II, Constitution sur la sainte Liturgie *Sacrosanctum concilium*, 4 décembre 1963 (=SC), dans AAS, 56 (1964), 118, traduction française dans *Vatican II, Fides*, n^o 73, 150.

le sacrement. Le fidèle malade ou vieillissant doit avoir exprimé, au moins implicitement, son intention de recevoir le sacrement (c. 843, §1) alors qu'il était conscient, ce qui répond à une exigence de respecter les convictions du fidèle et sauvegarde la perspective de foi dans laquelle le sacrement doit être administré⁵² (c. 1006). Le sacrement de l'onction des malades ne sera pas donné au fidèle qui persévère avec obstination dans un péché grave manifeste (c. 1007). En cas de doute sur ces éléments, le ministre devrait administrer le sacrement⁵³.

Regardons plus en profondeur l'obstination dont il est question au canon 1007. Selon Le Tourneau, il faut tenir compte du fait que lorsqu'il n'est pas prouvé de façon évidente que cette obstination est le signe d'un refus du sacrement, il faut présumer qu'il existe une intention, au moins implicite, de le recevoir et d'être aidé⁵⁴. La prudence pastorale serait recommandée lorsque le ministre doit discerner comment réagir dans le contexte du canon 1007. Il me semble que la responsabilité d'évaluer l'obstination dont il est question au canon 1007 vient seulement après quelques rencontres durant lesquelles le fidèle et le ministre dialoguent et clarifient les fondements doctrinaux du sacrement de l'onction des malades (c. 843, §2). Pour ce faire, il me semble que le ministre ne devrait pas refuser de rencontrer le fidèle pour faire une évaluation sérieuse de son obstination. Il devrait donner plus d'une monition pour inviter le fidèle à changer d'intention au sujet de l'euthanasie. Le jugement contemporain dans ces cas est presque toujours d'apprécier et d'accepter la probabilité d'un repentir de la part du fidèle⁵⁵.

2.2 — Le droit des fidèles aux sacrements

Le fidèle malade ou en danger de mort a besoin de la sollicitude pastorale du Christ et de l'Église. À ce moment de vulnérabilité, il attend le réconfort et l'aide spirituelle apportés par les sacrements. Les droits et devoirs ne sont pas basés sur une relation de revendication auprès des autorités ecclésiales mais plutôt sur la relation qui incorpore le fidèle au Christ par le baptême.

⁵² Voir *ibid.*, 172.

⁵³ Voir A. MARZOA, Commentaire du c. 1007, dans *CDCA* (=MARZOA, Commentaire du c. 1007), 875.

⁵⁴ Voir J. DÍAZ MORENO, *Direito dos fiéis aos sacramentos e auxílios espirituais*, Deveres e direitos dos Fiéis na Igreja, Universidade Católica Portuguesa, coll. Lusitania Canonica, 5, 1999, 78-79 (=DÍAZ MORENO, *Direito dos fiéis aos sacramentos e auxílios espirituais*). Voir traduction et citation dans LE TOURNEAU, *La dimension juridique du sacré*, 370.

⁵⁵ Voir F. McMANUS, « The Anointing of the Sick Is Not to Be Conferred upon Those Who Persevere Obstinate in Manifest Grave Sin (c. 1007) », dans *CLSA Comm2* (=McMANUS, « The Anointing of the Sick Is Not to Be Conferred [c. 1007] »), 1191.

Kaslyn⁵⁶ apporte deux observations qui me semblent pertinentes. Selon *Lumen gentium* n° 8, l'Église chemine vers la sainteté mais ses membres sont pécheurs. Les droits et les devoirs décrits dans le Code offrent à l'Église un moyen pour continuer son pèlerinage vers sa mission de salut. L'application ou le respect des droits et devoirs est parfois difficile dans le quotidien de l'Église et des conflits peuvent survenir à cause des manques d'information, manques de connaissances au sujet des procédures à appliquer pour protéger et pour faire valoir les droits et devoirs, manques de soutien de la part des évêques et du clergé. Le vocabulaire canonique sur les droits et devoirs peut être difficile à comprendre et à interpréter. Kaslyn suggère que l'Église *communio* gagnerait à articuler plus clairement ces droits et devoirs afin qu'ils soient mieux compris, mieux utilisés et mieux vécus par le fidèle (c. 209).

2.2.1 — Le droit aux sacrements en particulier (cc. 912, 960 et 1001)

Tous les fidèles éligibles ont le droit aux sacrements selon le canon 213. Toutefois, la situation juridique du fidèle n'est pas la même pour chaque sacrement⁵⁷. Apportons donc des précisions au sujet des droits à chaque sacrement.

Considérons d'abord le droit au sacrement de l'Eucharistie (c. 912). L'Église recommande vivement aux fidèles de recevoir la sainte communion⁵⁸. Le canon 912 décrit le droit fondamental d'origine divine à la sainte communion de la part de tout baptisé qui n'est pas empêché par le droit. Ce droit crée un devoir de la part des ministres sacrés : ils doivent distribuer la communion lorsqu'un fidèle le demande pourvu que le lieu et le moment soient propices. Le ministre sacré doit aussi assurer l'accès à la sainte communion dans la forme du Viatique au fidèle malade (c. 911, §1) et au fidèle en danger de mort (c. 921, §1).

Tout chrétien catholique a le droit de recevoir la sainte communion, à moins d'en être empêché par le droit. L'Église peut empêcher ou limiter la réception de la sainte communion à certains baptisés⁵⁹. Si un obstacle existe au for externe, le ministre n'a pas l'obligation de distribuer la communion.

⁵⁶ Voir R. KASLYN, « Spiritual Assistance (c. 213) », dans *CLSA Comm2* (=KASLYN, « Spiritual Assistance »), 267-268.

⁵⁷ Voir D. LE TOURNEAU, « Le canon 213 », 410.

⁵⁸ Voir *CÉC*, n° 1389, 299.

⁵⁹ Voir J. HUELS, « Recipient of Communion (c. 912) », dans *CLSA Comm2* (=HUELS, « Recipient of Communion [c. 912] »), 1107.

Quant au sacrement de pénitence (c. 960), le fidèle n'a pas le droit au pardon de Dieu mais plutôt à un acte de miséricorde puisque tous les péchés sont déjà expiés par la passion et la mort du Christ⁶⁰. Le pape Jean-Paul II, dans son exhortation apostolique post-synodale *Reconciliatio et penitentia*, rappelle aux ministres sacrés l'obligation « de faciliter aux fidèles la pratique de la confession intégrale et individuelle des péchés : elle constitue pour les chrétiens non seulement un devoir, mais un droit inviolable et inaliénable, en plus d'un besoin spirituel »⁶¹. Le fidèle qui a les dispositions intérieures requises a un droit de recevoir personnellement la grâce sacramentelle qui provient du sacrement de pénitence (c. 980)⁶². Le droit du fidèle est aussi explicité dans l'Encyclique *Redemptor hominis*. « C'est le droit à une rencontre plus personnelle de l'homme avec le Christ crucifié qui pardonne. [...]. Il est évident qu'il s'agit en même temps du droit du Christ lui-même à l'égard de chaque homme qu'il a racheté. C'est le droit de rencontrer chacun à ce moment capital de la vie de l'âme qu'est le moment de la conversion et du pardon »⁶³. Cette rencontre permet de façon irremplaçable au pardon et à la miséricorde de Dieu de se manifester et de rejoindre chaque fidèle personnellement. L'expérience du pardon et de la miséricorde se vit à l'intérieur d'un dialogue entre le pénitent et le ministre, là où peuvent se préciser les signes de conversion⁶⁴.

La dernière étape de cette réflexion porte sur le droit des fidèles au sacrement de l'onction des malades (c. 1001). Tout fidèle a le droit de demander et de recevoir les moyens de salut offerts par l'entremise de l'Église (c. 221, §1). Selon Stetson, il existe un droit fondamental et un devoir moral de recevoir l'onction des malades lorsque le baptisé est en péril de mort⁶⁵. C'est au cœur de la démarche personnelle de foi que le temps opportun pour chaque malade sera identifié et que le sacrement pourra être offert et reçu fructueusement tout en assurant le respect du droit du fidèle de le recevoir ou non⁶⁶.

⁶⁰ Voir D. LE TOURNEAU, *La dimension juridique du sacré*, 339.

⁶¹ JEAN-PAUL II, Exhortation apostolique post-synodale sur la réconciliation et la pénitence dans la mission de l'Église d'aujourd'hui *Reconciliatio et penitentia*, 2 décembre 1984 (=Retp) n° 33, dans AAS, 77 (1985), 271-272, traduction française dans DC, 82 (1985), 26.

⁶² Voir MisD dans AAS, 94 (2002), 453, traduction française dans DC, 84 (2002), 452.

⁶³ RH, n° 20, dans AAS, 71 (1979), 309-316, dans DC, 76 (1979), 317-318.

⁶⁴ Voir *Célébration de la pénitence et de la réconciliation. Livre de célébrations et notes pastorales*, Ottawa, Éditions de la CECC, 2004, n° 26, 12.

⁶⁵ Voir W. STETSON, Commentaire du c. 960, dans *Exegetical Comm*, vol. 3, n° 1 (=STETSON, Commentaire du c. 960), 754-757.

⁶⁶ Voir B. ZUBERT, Commentaire du c. 1001, *Exegetical Comm*, vol. 3, n° 1 (=ZUBERT, Commentaire du c. 1001), 874.

2.2.2 — *Le devoir des ministres (c. 843)*

Le canon 843 s'inspire du texte conciliaire *Lumen gentium* n° 37. Le canon 843, §1 dit que le ministre sacré ne peut pas refuser les sacrements au fidèle qui les demande opportunément, qui est dûment disposé et qui n'est pas empêché par le droit. Selon McManus, la juste cause pour refuser un sacrement est plus facile à évaluer ou à identifier lorsqu'elle est clairement articulée dans le droit (cf. un refus du sacrement de l'ordre, c. 1041). L'évaluation d'une demande opportune ou non opportune est beaucoup moins facile à effectuer. Le ministre peut évaluer si la demande est faite opportunément mais, de par la nature de son ministère, il lui est conseillé d'administrer le sacrement dans le contexte de son mandat de service ministériel. Parfois le ministre devra porter un jugement sur les dispositions du fidèle. La présomption doit toujours être en faveur du fidèle⁶⁷.

2.2.3 — *L'aide spirituelle (c. 213)*

Le canon 213 exprime un droit fondamental à caractère surnaturel des fidèles, non pas un privilège octroyé par les autorités ecclésiales mais un droit enraciné dans le baptême⁶⁸. L'Église doit donner l'aide spirituelle dont le fidèle a besoin pour favoriser sa transformation personnelle, soutenir sa relation personnelle avec Dieu et sa participation à la mission donnée par Dieu. Peu de fidèles sont conscients de ce droit à recevoir les sacrements, un droit qui est essentiel dans l'optique du salut des âmes⁶⁹.

Le Tourneau provoque une réflexion en posant la question suivante : existe-t-il vraiment un droit à la réception des sacrements puisque la grâce de Dieu n'est pas reçue par droit mais bien plutôt par gratuité du salut et du don que le Christ fait de lui-même pour nous sauver⁷⁰? Selon Flader le sacrement n'est pas un droit que le fidèle peut revendiquer de Dieu puisque

⁶⁷ Voir F. McMANUS, « Duties of Ministers and Others (c. 843) », dans *CLSA Comm2* (=McMANUS, « Duties of Ministers and Others [c. 843] »), 1023.

⁶⁸ Voir J. PROVOST, « Spiritual Assistance » (=PROVOST « Spiritual Assistance »), dans J.A. CORIDEN, T.J. GREEN et D.E. HEINTSCHEL (dir.), *The Code of Canon Law: A Text and Commentary*, New York et Mahwah, NJ, Paulist Press, 1985 (=CLSA Comm1), 147-148.

⁶⁹ Ibid.

⁷⁰ Voir D. LE TOURNEAU, « Le canon 213 sur le droit aux biens spirituels et ses conséquences sur les droits et les devoirs fondamentaux dans l'Église », dans *StC*, 47 (2013) (=LE TOURNEAU, « Le canon 213 »), 409; voir aussi LE TOURNEAU, *La dimension juridique du sacré*, 247.

le sacrement est une grâce et un fruit de la miséricorde divine. Le sacrement est plutôt un droit que le fidèle peut revendiquer de l'Église⁷¹.

Nous avons traité des obligations des fidèles pour la réception des sacrements et de leurs droits aux sacrements. Comment réconcilier ces obligations et ces droits en pratique lorsque le fidèle contemple ou a déjà effectué une demande pour recevoir l'euthanasie? Comment répondre aux besoins pastoraux de ces fidèles tout en respectant la doctrine de l'Église? Voilà le défi qui est rencontré de plus en plus fréquemment. Considérons donc quelques réponses des évêques.

3 — *Le suicide assisté (l'euthanasie) et l'accès aux sacrements : réponses des évêques*

Nous avons déjà regardé les documents de l'Église universelle. Cette section portera sur les réponses des évêques canadiens aux questions soulevées dans le contexte de la question de l'euthanasie et l'accès aux sacrements, plus spécifiquement sur trois documents, dont un national, la Déclaration du Président de la Conférence des évêques catholiques du Canada et deux régionaux, les Lignes directrices des évêques catholiques de l'Alberta et des Territoires du Nord-Ouest et la Réflexion pastorale des évêques catholiques de l'Atlantique.

3.1 — La Déclaration du Président de la CÉCC⁷²

Suite à l'adoption du projet de loi C-14, une Déclaration est émise par Monseigneur Douglas Crosby o.m.i., alors Président de la CECC, le 27 juin 2016. Il qualifie l'adoption de cette loi comme « une décision historique déplorable qui atteste l'échec de notre gouvernement et, en effet, de notre société d'assurer une protection humaine authentique pour les personnes souffrantes et vulnérables »⁷³. Il souligne que le Canada « suggère que la vie des personnes chroniquement malades, vulnérables ou handicapées ne mérite

⁷¹ Voir J. FLADER, « The Rights of the Faithful to the Spiritual Goods of the Church: Reflections on Canon 213 », dans *Apollinaris*, 65 (1992) (=FLADER, « The Rights of the Faithful to the Spiritual Goods of the Church »), 377-378.

⁷² CONFÉRENCE DES EVÊQUES CATHOLIQUES DU CANADA, Déclaration du Président de la CECC sur l'adoption récente du projet de loi C-14, qui légalise l'euthanasie et le suicide assisté, 27 juin 2016 (=CECC, Déclaration Projet de Loi C-14) <http://www.cccb.ca/site/frc/salle-de-presse/textes-officiels/declarations-publiques?start=20> (9 avril 2017).

⁷³ CECC, Déclaration Projet de Loi C-14, 1.

pas d'être vécue [...] notre société consacre désormais l'homicide comme une manière acceptable de mettre fin à la souffrance »⁷⁴. Il rappelle aux Canadiens et Canadiennes qu'ils sont capables de compassion, appelés à respecter et à protéger la vie humaine de la conception à la mort naturelle. Il souligne le devoir moral et social de toutes personnes de bonne volonté, surtout les catholiques, « de protéger les personnes vulnérables, de consoler celles qui souffrent et d'accompagner celles qui sont à l'article de la mort »⁷⁵. Il exprime la prière et l'espérance des évêques du Canada pour que les citoyens et citoyennes du Canada vivent une conversion du cœur⁷⁶.

Selon la Déclaration, la mise à mort intentionnelle par l'euthanasie d'une « personne mourante est un acte grave et moralement injustifiable », ⁷⁷ n'est pas un acte humanitaire et doit être rejeté. La Déclaration fait un bref bilan de gestes que pourraient poser ses lecteurs, c'est-à-dire aider les personnes malades et handicapées à trouver un sens à leur vie et à leur souffrance et choisir d'accompagner ces personnes dans leur souffrance⁷⁸.

3.2 — Les Lignes directrices des évêques de l'Alberta et des Territoires du Nord-Ouest

Le document intitulé *Lignes directrices pour la célébration des sacrements avec les personnes et avec les familles considérant ou choisissant la mort par suicide assisté ou l'euthanasie. Un vade-mecum pour les prêtres et les paroisses*⁷⁹ a été publié par six évêques-membres de l'Assemblée des évêques catholiques de l'Ouest le 14 septembre 2016. Les signataires anticipent que les personnes qui considèrent l'euthanasie souhaiteront recevoir et demanderont les sacrements de la pénitence et de l'onction des malades. Ce document est une réponse à la question des évêques : « Comment répondre à ces demandes avec une sollicitude pastorale qui exprime le profond souci de l'Église pour le salut des âmes tout en protégeant la dignité

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid, 2.

⁷⁸ Voir *ibid.*

⁷⁹ Voir LES ÉVÊQUES CATHOLIQUES DE L'ALBERTA ET DES TERRITOIRES DU NORD-OUEST, *Lignes directrices pour la célébration des sacrements avec les personnes et avec les familles considérant ou choisissant la mort par suicide assisté ou l'euthanasie. Un vade-mecum pour les prêtres et les paroisses*, 14 septembre 2016 (=ÉVÊQUES CATHOLIQUES DE L'ALBERTA ET DU NORD-OUEST, Lignes directrices), https://caedm.ca/Portals/0/documents/family_life/2017-02-09_SacramentalPracticeinSituationsofEuthanasia-FR.pdf?ver=2017-02-21-164850-017 (29 mars 2017).

des sacrements [...] »⁸⁰. Ce même document a été adopté avec permission et a été émis le 12 mai 2017 par l'archevêque d'Ottawa qui est aussi l'évêque *in persona episcopi* du diocèse d'Alexandria-Cornwall (Canada). La lettre de présentation décrit ce document comme un ensemble de principes et de réflexions à la fois compatissants et pastoraux qui peuvent éclairer et servir de guide lorsque les pasteurs sont confrontés aux situations difficiles qui pourraient survenir suite à la légalisation de l'euthanasie et du suicide assisté. Ce document se veut un outil pour mieux répondre à la menace à la dignité et à la valeur de la vie humaine. Il aidera à « adopter une attitude pastorale empreinte de compassion, à veiller au soin des personnes de manière qui témoigne du souci profond de l'Église pour le salut des âmes, la sauvegarde de la dignité des sacrements [...] »⁸¹.

Le chapitre intitulé « Guide pour discerner les situations particulières »⁸² se veut une aide pour le prêtre qui discernera les situations de demande des sacrements de la pénitence et de l'onction des malades de la part d'une personne au seuil de la mort par euthanasie.

Considérons d'abord les directives au sujet du sacrement de pénitence et en premier la question du secret de la confession (cc. 983 et 984). Ce que le prêtre apprendra au sujet des intentions du pénitent ne peut être divulgué. Il devra faire un discernement prudent s'il a appris que le pénitent considère demander l'euthanasie. L'initiative pastorale auprès de cette personne devrait se faire au cœur d'un dialogue pastoral privé. Il est recommandé de remettre la célébration du sacrement s'il existe une raison publique manifeste de supposer que le pénitent désire se confesser et obtenir l'absolution, en partie, à cause de son intention de choisir le l'euthanasie⁸³. La personne qui demande le sacrement devra remplir les conditions pour le recevoir, soit le demander opportunément, être dûment disposée et ne pas être empêchée par le droit (c. 843, §1). La demande du sacrement fait preuve du minimum de foi requis. Si la personne ne semble pas dûment disposée, le prêtre doit faire tout son possible pour amener la personne à développer la disposition nécessaire, sans quoi le prêtre pourra et devra refuser la célébration du sacrement⁸⁴. La personne doit regretter les péchés qu'elle a commis, prendre la ferme résolution

⁸⁰ Ibid.

⁸¹ Voir T. PRENDERGAST, Lettre d'introduction aux Lignes directrice pour la célébration des sacrements avec les personnes et avec les familles considérant ou choisissant la mort par suicide assisté ou l'euthanasie, 12 mai, 2017, <http://catholiqueottawa.ca/documents/2017/5/Vade-mecum%20Suicide%20assisté-Euthanasie.pdf> (16 janvier 2018).

⁸² ÉVÊQUES CATHOLIQUES DE L'ALBERTA ET DU NORD-OUEST, Lignes directrices, n^{os} 23-83, 13-28.

⁸³ Voir *ibid.*, n^o 25, 14.

⁸⁴ Voir *ibid.*, n^o 27, 15.

de ne plus pécher et de retourner à Dieu (c. 987). Le prêtre peut refuser l'absolution seulement pour des raisons graves. Si le pénitent n'est pas dûment disposé, mieux vaut remettre l'absolution que de la refuser. Si possible, le prêtre doit inviter le pénitent à réfléchir aux arguments fournis contre l'intention délibérée d'avoir recours à l'euthanasie. Le prêtre doit déterminer s'il pourrait accorder l'absolution dans une rencontre ultérieure. Si le pénitent n'est toujours pas dûment disposé, le prêtre aidera le pénitent à comprendre que l'absence de cette disposition empêche l'absolution⁸⁵.

Afin d'assurer l'accompagnement pastoral « adéquat »⁸⁶, le document offre des directives pour distinguer les demandes pour le sacrement de pénitence dans la situation d'indécision et dans situation de détermination à procéder soit par une décision manifeste à exécution lointaine ou à exécution prochaine, soit par une décision privée à exécution lointaine ou à exécution prochaine⁸⁷.

Regardons d'abord la situation d'un pénitent indécis⁸⁸. Si le pénitent mentionne qu'il considère recourir à l'euthanasie sans avoir pris une décision, le prêtre doit considérer la demande pour le sacrement comme une indication de la disposition à recevoir l'absolution. La grâce de l'absolution peut transformer la réflexion du pénitent au sujet de sa façon de mourir et ouvrir à une rencontre qui mènera à la découverte de la miséricorde de Dieu. L'absolution ne peut pas se donner pour un péché futur, mais le prêtre est invité à éveiller un sentiment de remords chez le pénitent d'avoir entretenu l'intention de commettre un péché ou à offrir la grâce divine afin de guérir ce qui a pu conditionner le pénitent à en venir à une telle intention. Si le pénitent démontre un repentir approprié, l'absolution devrait être donnée.

Si le pénitent veut procéder⁸⁹, le prêtre doit évaluer si la décision est déjà publique ou seulement privée. Il doit déterminer si la mise en œuvre de la décision est imminente ou prévue pour l'avenir. Dans le contexte d'une décision qui a déjà été rendue manifeste⁹⁰, pour le prêtre qui accueille le pénitent qui se confesse d'avoir fait les arrangements nécessaires pour recevoir l'euthanasie, cette confession indique que le pénitent est conscient que cet acte est un péché et qu'il s'en repent; le prêtre peut s'engager à célébrer le sacrement de pénitence. Le pénitent doit renoncer à l'euthanasie. Le pénitent peut, par contre, annoncer sa décision durant la confession; sa façon de la

⁸⁵ Voir *ibid.*, n° 28, 15.

⁸⁶ Voir *ibid.*, n° 40, 17.

⁸⁷ Voir *ibid.*, n°s 41-54, 17-20.

⁸⁸ Voir *ibid.*, n° 41, 17.

⁸⁹ Voir *ibid.*, n° 42, 17.

⁹⁰ Voir *ibid.*, n°s 43-46, 17-18.

présenter indique qu'il ne sait pas que demander l'euthanasie est un péché grave. Si le pénitent ne semble pas comprendre que son comportement est un péché grave, le prêtre peut recommander au pénitent de s'informer sur la volonté divine à ce sujet. Si le pénitent ne reconnaît pas le péché dont il est question, le prêtre doit explorer l'état de la conscience du pénitent et éveiller le pénitent à la voix de Dieu⁹¹.

Le pénitent qui est déterminé de procéder à l'euthanasie peut considérer une mise en œuvre lointaine ou prochaine. Si elle est lointaine⁹², il peut y avoir espoir de conversion et de renonciation à l'acte ce qui donne raison d'accorder l'absolution pourvu que le pénitent reconnaisse que recourir à l'euthanasie est un péché grave et qu'il promet de renoncer à son choix. Si le pénitent approche de sa mort naturelle, l'absolution peut être donnée. Si la mise en œuvre de la décision est prochaine⁹³, il ne faut pas croire qu'un changement de cœur est impossible. L'absolution ne peut pas être accordée s'il y a peu ou pas de chance que le pénitent renonce à l'acte prévu.

Regardons maintenant les considérations canoniques⁹⁴ et sacramentelles⁹⁵ au sujet du sacrement de l'onction des malades⁹⁶. Les lignes directrices proposent un accompagnement pastoral « adéquat »⁹⁷ et distinguent les demandes pour le sacrement de l'onction des malades dans diverses situations.

Considérons d'abord la situation d'indécision⁹⁸. La personne n'a pas encore finalisé sa décision de demander l'euthanasie. Le sacrement de l'onction des malades ne doit pas être refusé. L'occasion d'offrir des explications et des ressources spirituelles et pastorales doit être captée. C'est un moment opportun de rencontre avec Jésus guérisseur⁹⁹.

Considérons maintenant la situation où la personne veut procéder¹⁰⁰. La personne se trouve en « péril spirituel »¹⁰¹ et a besoin d'accompagnement, de compassion et d'écoute attentive. Le malade doit être dûment disposé et ouvert à la grâce de Dieu. On souligne qu'une demande déjà effectuée pour

⁹¹ Voir *ibid.*, n° 45, 18.

⁹² Voir *ibid.*, n° 47-48, 18.

⁹³ Voir *ibid.*, n° 49-51, 18-19.

⁹⁴ Voir *ibid.*, n° 62-64, 23.

⁹⁵ Voir *ibid.*, n° 65-69, 23-24.

⁹⁶ Voir *ibid.*, n° 60-61, 22.

⁹⁷ *Ibid.*, section C, 24.

⁹⁸ Voir *ibid.*, n° 70, 24.

⁹⁹ Voir *ibid.*

¹⁰⁰ Voir *ibid.*, n° 71-72, 25.

¹⁰¹ *Ibid.*, n° 71, 25.

l'euthanasie ne veut pas dire que le malade n'est pas dûment disposé. Le prêtre doit tout faire « pour ranimer la flamme de la foi »¹⁰². Toutefois, la personne doit renoncer à sa décision de passer à l'acte avant de recevoir l'onction.

La décision de procéder à l'euthanasie peut être manifeste ou privée. La situation d'une décision manifeste¹⁰³ est la plus problématique et nécessite un discernement attentif en dialogue avec la personne. Si la personne demeure obstinée dans son intention, elle n'est pas dûment disposée et l'administration du sacrement doit être remise. Si la mise en œuvre de la décision est lointaine¹⁰⁴ et s'il est possible de prévoir que la personne soit capable de demander le sacrement de l'onction des malades et si elle désire faire ce qui est nécessaire pour s'ouvrir humblement à recevoir la grâce de Dieu, les raisons sont bonnes pour célébrer le sacrement. Le malade doit reconnaître que l'euthanasie serait une faute grave et promettre d'abandonner ce choix. Si le malade approche de sa mort naturelle, le sacrement peut être célébré. Si la mise en œuvre de la décision de passer à l'acte de l'euthanasie est prochaine¹⁰⁵, que la demande du sacrement de l'onction a été faite juste avant la mise en œuvre de la décision manifeste d'aller de l'avant avec la réception de l'euthanasie, l'onction doit être refusé s'il y a peu d'espoir que le malade cesse l'obstination dans un péché grave et manifeste¹⁰⁶.

3.3 — Réflexion pastorale des évêques de l'Atlantique

Ce document intitulé *Réflexion pastorale sur l'assistance médicale à mourir* a été publiée le 27 novembre 2016¹⁰⁷ par dix évêques membres de l'Assemblée des Évêques de l'Atlantique. Une version révisée émise le 25 janvier 2018¹⁰⁸ est une réflexion sur la problématique qu'est l'assistance médicale à mourir suite à l'identification d'une réelle inquiétude suscitée par

¹⁰² Ibid., n° 72, 25.

¹⁰³ Voir ibid., n° 73, 26.

¹⁰⁴ Voir ibid., n°s 74-75, 26.

¹⁰⁵ Voir ibid., n°s 76-78, 26-27.

¹⁰⁶ Ibid., n° 76, 26.

¹⁰⁷ Voir ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, *Réflexion pastorale sur l'assistance médicale à mourir*, 27 novembre, 2016 (=ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, *Réflexion pastorale* 2017) <http://antigonishdiocese.com/index.php/news-to-you/upcoming-events/67-assisted-suicide> (29 mars 2017).

¹⁰⁸ Voir ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, *Réflexion pastorale sur l'assistance médicale à mourir*, 25 janvier, 2018 (=ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, *Réflexion pastorale* 2018) <http://antigonishdiocese.com/index.php/news-to-you/upcoming-events/67-assisted-suicide> (23 août 2018), 1.

la Loi C-14 chez les malades et leurs proches ainsi que chez le personnel médical et infirmier, les ministres et le personnel affecté aux soins spirituels. Dans le contexte législatif de la Loi C-14, les évêques réaffirment que la vie est un don sacré de Dieu¹⁰⁹ et s'engagent à approfondir l'enseignement moral de l'Église relativement à l'euthanasie afin d'identifier les meilleurs moyens pour accompagner des personnes en fin de vie¹¹⁰.

La réflexion porte sur un enjeu complexe qui donne lieu à une prise de conscience au sujet des personnes pour qui la vie n'a plus de valeur pour de multiples raisons : des souffrances insupportables, des pertes de fonctionnement et des sentiments d'être devenues un fardeau. Les évêques veulent comprendre et réagir pastoralement aux questions soulevées par cet enjeu. La réflexion nous rappelle la scène de Jésus auprès des disciples d'Emmaüs où Jésus écoute, éprouve de l'empathie et encourage le partage du désarroi des disciples. Cette réaction de Jésus illustre bien l'importance d'être pastoralement près des gens dans ce qu'ils vivent afin d'être à l'écoute de leurs souffrances pour pouvoir mieux les accompagner¹¹¹.

Les évêques font amplement référence à l'Exhortation apostolique *Evangelii gaudium*¹¹² du pape François pour élaborer leur réflexion sur l'importance de l'art de l'accompagnement qui présente, comme dit le pape François, « un regard respectueux et plein de compassion mais qui en même temps guérit, libère et encourage à mûrir dans la vie chrétienne »¹¹³, une approche qui « fait appel à la prudence, la compréhension, la patience et la docilité à l'Esprit »¹¹⁴ et valorise l'écoute avec le cœur qui « rend possible la proximité, sans laquelle il n'existe pas une véritable rencontre spirituelle »¹¹⁵. L'accompagnement pastoral, dont l'objectif premier est de communiquer la compassion, l'amour et la miséricorde du Christ et de rappeler le caractère sacré de la vie¹¹⁶, est fondamental dans les relations avec la personne qui vit de grandes souffrances et qui considère l'option de l'euthanasie. L'angoisse ou la crainte grave de la souffrance peuvent engendrer des sentiments d'impuissance et de désespoir qui conduisent la personne à se questionner sur le comment et le pourquoi de continuer à vivre et diminuer le sens de responsabilité

¹⁰⁹ Ibid.

¹¹⁰ Voir *ibid.*

¹¹¹ Voir *ibid.*, 2.

¹¹² Voir FRANÇOIS, Exhortation apostolique sur l'annonce de l'Évangile dans le monde d'aujourd'hui *Evangelii gaudium*, 24 novembre 2013 (=EG), dans AAS, 105 (2013), 1019-1137, traduction française dans DC, 111 (2014), 6-81.

¹¹³ EG, n° 169, dans AAS, 105 (2013), 1091, DC, 111 (2014), 51-52.

¹¹⁴ ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE 2018, Réflexion pastorale, 2.

¹¹⁵ EG, n° 171, dans AAS, 105 (2013), 1091-1092, DC, 111 (2014), 52.

¹¹⁶ Voir ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, Réflexion pastorale 2018, 3.

de la personne. L'accompagnement pastoral attentif aidera à comprendre les circonstances qui disposent la personne à considérer l'euthanasie¹¹⁷. Les ministres qui œuvrent auprès des malades et des personnes vulnérables sont invités à devenir des signes compatissants de la tendresse et de la miséricorde de Dieu¹¹⁸.

Les évêques prennent position sur les soins pastoraux à prodiguer dans le contexte de l'accès aux sacrements. On rappelle aux ministres que les sacrements ne devraient pas être refusés chez la personne qui a la foi et l'espérance. Toutefois, il y aura des occasions où la personne persiste dans son choix. La célébration des sacrements devient impossible mais la personne ne doit pas être abandonnée mais plutôt entourée de sollicitude pastorale et recommandée à la miséricorde de Dieu¹¹⁹. Au cœur de leur approche pastorale, on rappelle à ceux et celles qui prodiguent des soins spirituels que

personne ne devrait se voir refuser la grâce des sacrements lorsque l'on peut percevoir en elle de la foi, de l'espérance et de l'ouverture au fait que la vie est un don. Cependant [...] il peut y avoir des occasions où, en dépit des soins prodigués et de notre accompagnement pastoral, une personne persiste résolument à choisir de mettre fin à sa vie. Même si un tel choix rend la célébration des sacrements impossible, nous n'abandonnons jamais les personnes qui décident de s'enlever la vie ou demande de l'aide pour le faire. À la lumière de l'évangile et en s'inspirant de la compassion que le Christ a manifestée tout au cours de son ministère public, nous devons continuer de les entourer de notre sollicitude pastorale [...] et à recommander toute personne à la miséricorde de Dieu¹²⁰.

Cette approche fera la lumière sur une situation complexe qui pourrait inclure la célébration ou non des sacrements¹²¹.

Cette revue des réponses provenant des évêques de l'Ouest et de l'Est canadien nous permet de constater qu'en ce qui a trait à l'accès aux sacrements, les deux documents arrivent à des conclusions semblables : il y a des circonstances où les sacrements peuvent être célébrés ou peuvent être refusés ou remis à plus tard. Le processus pour arriver à cette décision est différent. Tout en proposant un accompagnement pastoral adéquat, le document de l'Ouest semble beaucoup plus directif dans sa présentation des étapes à suivre pour discerner la décision de donner accès ou non à la célébration du sacrement. Le document de l'Est semble lancer une invitation pressante au

¹¹⁷ ASSEMBLÉE DES ÉVÊQUES DE L'ATLANTIQUE, *Réflexion pastorale* 2018, 3.

¹¹⁸ Voir *ibid.*, 3.

¹¹⁹ Voir *ibid.*, 4.

¹²⁰ *Ibid.*, 4.

¹²¹ Voir *ibid.*, 3-4.

discernement individuel avec le fidèle, laissant place au dialogue et à l'ouverture aux innovations pastorales, créant ainsi le contexte où la grâce peut passer pour éclairer la conscience du fidèle.

4 — *Amoris laetitia* : lieu parallèle proposé

Avec une ouverture à décrire la situation du fidèle qui considère l'euthanasie comme étant une situation « irrégulière », réfléchissons sur l'application *mutatis mutandis* de l'exhortation apostolique post-synodale du pape François, *Amoris laetitia*¹²², spécifiquement sur le Chapitre VIII intitulé « Accompagner, discerner et intégrer la fragilité »¹²³.

Nous proposons que ce lieu parallèle pourrait éclairer la réflexion sur l'accès aux sacrements. Cette réflexion qui souligne l'importance de l'accompagnement, le discernement, ce concept-clé de l'exhortation¹²⁴ et l'intégration de la fragilité serait-elle une invitation à l'approfondissement de certaines questions doctrinales, morales, spirituelles et pastorales qui surgissent au cœur de la réalité du vécu du fidèle qui a des droits et devoirs en ce qui a trait à l'accès à l'aide spirituelle offerte par les sacrements? Est-ce que la situation du fidèle qui contemple ou a déjà effectué une demande pour recevoir l'euthanasie modifie ces droits et ces devoirs? En effet, oui. Nous avons vu qu'il faut exercer un discernement quant à la gravité de la situation. Nous croyons que cette réflexion pourrait être pertinente à l'identification de certains vrais besoins du fidèle ainsi que des approches et des réponses possibles à ces besoins tout en favorisant la mission de l'Église qui veut être présence du Christ auprès des fidèles fragilisés par la maladie grave, voire mortelle, dans une société où l'euthanasie est légale mais immorale.

Le Chapitre VIII d'*Amoris laetitia* invite à la miséricorde, à la gradualité pastorale et non à une gradualité doctrinale. Il invite à une réflexion sur les normes, les circonstances atténuantes dans le discernement pastoral et sur la logique de la miséricorde pastorale. François compare la mission de l'Église à celle d'un « hôpital de campagne »¹²⁵ où on doit accompagner, redonner confiance et espérance et être une lumière dans la tempête pour les personnes

¹²² Voir FRANÇOIS, Exhortation apostolique post-synodale sur l'amour dans la famille *Amoris laetitia*, 19 mars 2016 (=AL), dans AAS, 108 (2016) 312-447, traduction française DC, 108 (2016), 5-94.

¹²³ Voir AL, n^{os} 291-312, dans AAS, 108 (2016), 428-440, DC, 108 (2016), 82-90.

¹²⁴ Voir C. SCHÖNBORN, « Le pape François nous invite à parler de nos familles telles qu'elles sont », dans DC, 108 (2016), (=SCHÖNBORN, « Le pape François nous invite »), 100.

¹²⁵ AL, n^o 291, dans AAS, 108 (2016), 428, DC, 108 (2016), 82.

fragiles¹²⁶. Cette gradualité pastorale miséricordieuse ne change pas la doctrine mais amène le fidèle vers la doctrine et invite au dialogue¹²⁷. Elle affronte la situation du fidèle de façon constructive à la lumière de l'Évangile et favorise une gradualité dans le choix des actes libres que le fidèle peut poser dans son cheminement de croissance guidé et soutenu par la grâce¹²⁸. Si une personne veut poser un geste qui le porte au péché grave, la pédagogie de la compassion et de la bienveillance évangélique ne devrait-elle pas être l'invitation à la conversion pour revenir à la plénitude du plan de Dieu sur la personne, ce qui est toujours possible avec la force de la grâce?¹²⁹. Ces fidèles

ne doivent pas se sentir excommuniés, [...] mais ils peuvent vivre et mûrir comme membres vivants de l'Église. Les prêtres sont encouragés à accompagner chaque fidèle discrètement dans un discernement personnel et individuel. Ce dialogue, enraciné dans l'amour de l'Église et de son enseignement recherche la volonté de Dieu et pourrait orienter le fidèle à prendre conscience de sa situation devant Dieu. Chaque fidèle devrait être considéré non comme un problème mais bien comme une personne unique qui a son histoire et son parcours vers Dieu¹³⁰.

Ce dialogue au for interne pourrait concourir à la formation d'un jugement correct pour éviter des entraves à la participation à la vie de l'Église¹³¹ en procédant vers l'euthanasie. L'exhortation rappelle qu'il « n'est plus possible de dire que tous ceux qui se trouvent dans une certaine situation dite "irrégulière" vivent dans une situation de péché mortel, privés de la grâce sanctifiante »¹³² puisque le fidèle peut ne pas connaître ou saisir la norme à suivre. Une fois les conditionnements identifiés chez un fidèle, l'exhortation spécifie que la conscience du fidèle « doit être mieux prise en compte par la praxis de l'Église dans certaines situations » qui ne sont pas selon ses attentes objectives¹³³. Le développement de la conscience doit être éclairé, formé et accompagné par un ministre qui soulignera l'importance de la confiance dans la grâce¹³⁴. Le ministre qui accompagne un fidèle en discernement est invité à prendre la voie d'une pastorale miséricordieuse, cette réponse gratuite à

¹²⁶ Voir *ibid.*

¹²⁷ Voir *AL*, n° 293, dans *AAS*, 108 (2016), 429, *DC*, 108 (2016), 83.

¹²⁸ Voir *AL*, n° 295, dans *AAS*, 108 (2016), 430, *DC*, 108 (2016), 83-84.

¹²⁹ Voir *AL*, n° 297, dans *AAS*, 108 (2016), 431, *DC*, 108 (2016), 84; voir aussi SCHÖNBORN, « Le pape François nous invite », *DC*, 108 (2016), 98.

¹³⁰ Voir SCHÖNBORN, « Le pape François nous invite », *DC*, 108 (2016), 98.

¹³¹ Voir *AL*, n° 300, dans *AAS*, 108 (2016), 433-434, *DC*, 108 (2016), 85-86.

¹³² *AL*, n° 301, dans *AAS*, 108 (2016), 434, *DC*, 108 (2016), 86.

¹³³ Voir *AL*, n° 303, dans *AAS*, 108 (2016), 435, *DC*, 108 (2016), 87.

¹³⁴ Voir *ibid.*

l'initiative de l'amour de Dieu¹³⁵. Le pape François dit comprendre ceux qui préfèrent une pastorale rigide qui ne prête à aucune confusion. Toutefois, il exprime sa préférence pour une approche qui reconnaît le désir du Christ pour une Église attentive au bien qu'opère l'Esprit en présence de la fragilité¹³⁶. Le Pape fait une mise en garde contre un comportement de contrôleur plutôt que de facilitateur de la grâce. Les ministres sont invités à écouter, à entrer au cœur du drame des personnes pour comprendre leur vécu et les aider à reconnaître et vivre leur place dans l'Église¹³⁷. Selon Schönborn, l'approche décrite par le pape François dans *Amoris laetitia* est la boussole qui indique le chemin¹³⁸. Pourrait-elle être une boussole pour guider l'approche canonique et pastorale offerte dans le contexte d'une demande d'accès aux sacrements de la part du fidèle qui contemple l'euthanasie? Nous pourrions peut-être nous demander comme l'a fait Schönborn¹³⁹ lorsqu'il décrit la façon dont *Amoris laetitia* traite les échecs de l'amour : est-ce que l'Église est vraiment le lieu où il est possible d'expérimenter la miséricorde de Dieu lorsque le fidèle considère ou choisit la mort par l'euthanasie ?

Conclusion

L'accès aux sacrements par le fidèle qui contemple ou demande l'euthanasie demeure une question pertinente et pressante aujourd'hui. Nous avons tenté d'éclairer et de susciter une réflexion sur les dimensions canonique, doctrinale et pastorale de la question. Nous avons porté un regard sur les sources législatives qui donnent naissance aux considérations canoniques et pastorales. Nous avons examiné les canons qui traitent des obligations des fidèles pour la réception des sacrements de l'Eucharistie (cc. 915 et 916), de la pénitence (cc. 987 et 988) et de l'onction des malades (cc. 1004-1007), des droits des fidèles aux sacrements en particulier (cc. 912, 960 et 1001), le devoir des ministres (c. 843) et le droit à l'aide spirituelle telle que les sacrements (c. 213). Nous avons exploré les réponses des évêques en ce qui a trait à l'accès aux sacrements dans le contexte de l'euthanasie. Finalement, nous avons considéré la pertinence *mutatis mutandis* du Chapitre VIII de l'exhortation apostolique post-synodale *Amoris laetitia*. Inspirés par Schönborn¹⁴⁰,

¹³⁵ Voir *AL*, n° 311, dans *AAS*, 108 (2016), 439, *DC*, 108 (2016), 90.

¹³⁶ Voir *AL*, n° 308, dans *AAS*, 108 (2016), 438, *DC*, 108 (2016), 89.

¹³⁷ Voir *AL*, n° 312, dans *AAS*, 108 (2016), 440, *DC*, 108 (2016), 90.

¹³⁸ Voir C. SCHÖNBORN, « Le pape François nous invite », 102.

¹³⁹ Voir *ibid.*, 101.

¹⁴⁰ Voir C. SCHÖNBORN, « Le pape François nous invite », 101.

en concluant, nous avons soulevé la question : est-ce que l'Église est vraiment le lieu où il est possible d'expérimenter la miséricorde de Dieu lorsque le fidèle considère ou choisit la mort par l'euthanasie ?

Cette réflexion suscite d'autres questions sur lesquelles nous pourrions nous attarder avant de tenter de répondre à la question soulevée dans ce travail de recherche. Est-il possible d'espérer que ce fidèle puisse compter sur l'aide provenant des biens spirituels de l'Église, surtout les sacrements ? Peut-il au moins compter sur un processus de discernement individuel qui respecte sa conscience, un accompagnement de la part de ministres ou de pasteurs d'âmes qui acceptent de répondre à la requête du fidèle en se présentant à son chevet, de cheminer, d'écouter, d'accompagner le fidèle pour l'évangéliser, de considérer les circonstances atténuantes et d'appliquer la logique de la pastorale de la miséricorde ? Nous nous souviendrons que le ministre a le devoir d'aider le fidèle à exercer son droit d'accès aux sacrements¹⁴¹. Est-ce que les ministres et les pasteurs sauront imiter Jésus qui, devant la souffrance de l'être humain, fait preuve de discrétion, ne fait pas de grands discours mais plutôt sait utiliser « des mots qui ouvrent l'histoire des personnes en leur faisant accomplir des mouvements intérieurs »¹⁴² ? Est-ce que les ministres et les pasteurs de l'Église d'aujourd'hui se laisseront inspirer et interpeler par l'observation du pape Jean-Paul II qui décrit le cri du cœur de l'homme souffrant, angoissé et parfois même désespéré comme une demande d'accompagnement, de solidarité et de soutien dans l'épreuve¹⁴³ ? Est-ce que l'Église, dans la personne de ses ministres, acceptera d'être celle qui « est là où des pécheurs repentants se savent accueillis, là où des personnes brisées par l'échec et la souffrance peuvent retrouver l'espérance, là où les sacrements prolongent les gestes miséricordieux de Jésus pour ceux et celles qui croient et aiment aujourd'hui »¹⁴⁴.

Le Tourneau observe que le fidèle ignore fréquemment ses droits et ses devoirs ce qui engendre une « incertitude objective quant aux moyens prévus par l'ordre canonique pour protéger ou agir dans une situation juridique déterminée »¹⁴⁵. Sera-t-il nécessaire éventuellement pour un fidèle qui considère ou qui a effectué la demande pour l'euthanasie et qui se voit refuser

¹⁴¹ Voir MARTÍN DE AGAR, Commentaire du c. 843, 404.

¹⁴² X. THÉVENOT, *Souffrance, bonheur, éthique. Conférences spirituelles*, Mulhouse, Éditions Salvator, 1990, 31-32.

¹⁴³ Voir EV, n° 67, dans AAS, 87 (1995), 479, DC, 77 (1995), 385.

¹⁴⁴ N. PROVENCHER et G. BERLIET, *Les divorcés remariés et l'eucharistie*, Montréal, Médiaspaul, 2011, 42.

¹⁴⁵ D. LE TOURNEAU, *Droits et devoirs fondamentaux des fidèles et des laïcs dans l'Église*, Montréal, Wilson & Lafleur, 2011, 375.

les sacrements demandés de revendiquer le droit qui est décrit au canon 213 ? Selon Le Tourneau :

le c. 213 contient aussi un principe informateur de l'organisation ecclésiastique, [...] celle-ci doit s'adapter aux besoins des fidèles et se structurer de façon à répondre *abundanter* aux intérêts des fidèles en matière de Parole de Dieu et de sacrements. Cet intérêt des fidèles est juridiquement protégé. Il peut donc faire l'objet d'une pétition (LG37/a). Les fidèles sont également habilités à intervenir, par la voie judiciaire ou par la voie administrative, quand ces droits sont en jeu. Ce principe informateur tout comme l'intérêt juridiquement protégé revêtent d'une importance particulière quand le mode de vie, tant civil que canonique, des fidèles et leur spiritualité requièrent un soin pastoral particulier¹⁴⁶.

Serait-il possible de décrire la situation du fidèle qui considère ou qui a effectué une demande pour l'euthanasie comme une situation qui requiert un soin pastoral particulier auquel ce fidèle a droit et qu'il pourrait revendiquer par la voie judiciaire ou par la voie administrative ?

Depuis le Concile Vatican II, l'Église a le devoir de scruter les signes des temps et d'y apporter un éclairage par la lumière de l'Évangile¹⁴⁷. Nous espérons que cette réflexion apportera une lumière canonique et pastorale qui éclairera quelques réponses au dilemme que crée la demande d'accès aux sacrements par le fidèle qui considère ou demande l'euthanasie. Est-ce que ce dilemme canonique et pastoral serait un signe des temps qui survient dans le milieu des soins de santé ? Est-ce que l'Église universelle et l'Église du Canada seraient invitées à scruter le vécu qui donne naissance à ce dilemme pour apporter une lumière canonique, doctrinale et évangélique afin de continuer d'assurer sa présence solidaire auprès de ce fidèle qui vit une situation irrégulière aux yeux de l'Église ?

Nous avons souligné les nombreuses questions suscitées par ce dilemme. Il y en a certainement d'autres qui surgissent et qui surviendront dans nos milieux. Éclairés par toutes ces considérations nous voulons offrir une réponse à la question de recherche. Selon nous, le fidèle qui considère ou qui a effectué une demande pour l'euthanasie aura définitivement besoin de l'aide provenant des biens spirituels de l'Église, surtout des sacrements. Son droit d'y avoir accès devra faire l'objet d'une réflexion doctrinale et canonique et d'un discernement pastoral qui fera preuve de gradualité pastorale, remplis de compassion miséricordieuse et éclairés par la lumière de l'Évangile.

¹⁴⁶ LE TOURNEAU, *La dimension juridique du sacré*, 245-246.

¹⁴⁷ Voir CONCILE VATICAN II, Constitution pastorale sur l'Église dans le monde de ce temps *Gaudium et spes*, 7 décembre 1965 (=GS), n^{os} 1-4, dans AAS, 58 (1966) 1025-1028, traduction française dans *Vatican II, Fides*, 173-176.

Dieu se servira de ministres pour être les instruments de la grâce de la conversion et du salut de ce fidèle. Les sacrements seront parfois administrés, parfois remis à plus tard, et même parfois refusés. Ce qui demeure immuable c'est la nécessité urgente de la présence du ministre accompagnateur ouvert qui accepte de collaborer à l'œuvre de l'Esprit dans le fidèle et en lui-même et qui accepte d'être un instrument de la présence de l'Église et du Christ guérisseur, auprès du fidèle souffrant et parfois désespéré à tel point qu'il préfère la mort à la vie. Nous croyons que cette présence favorisera et soutiendra le cheminement personnel de ce fidèle vers un choix libre et éclairé pour la vie plutôt que pour la mort par euthanasie.

THE UNIVERSALITY OF THE *ORDO IUDICIARIUS* OF THE CHURCH

WILLIAM L. DANIEL

SUMMARY — At the time of the celebration of the Second Vatican Ecumenical Council, some bishops began proposing aspects of decentralization of the administration of justice, especially in the form of particular procedural law and regional third instance tribunals. Such proposals continued to be made until 1983, when the revised *CIC* confirmed the canonical tradition of the universality of the judicial order (*ordo iudiciarius*). Thus, the procedural law of the Church is for the most part universal law, though some particular procedural laws are permitted by the supreme legislator. Also, the judge is to observe this procedural law and the common jurisprudence of the Church, even if in practice many particular matters in a trial are subject to the disposition of the judge as is indicated in law. Moreover, vigilance over the correct administration of justice is carried out regularly for the whole Church by the Supreme Tribunal of the Apostolic Signatura, while the vigilance of the bishop moderator of the individual tribunal is essential.

RÉSUMÉ — Au moment de la tenue du Concile œcuménique Vatican II, certains évêques ont commencé à proposer des aspects de la décentralisation de l'administration de la justice, notamment sous la forme d'un droit procédural particulier et de tribunaux régionaux de troisième instance. Ces propositions ont été faites jusqu'en 1983, lorsque le nouveau Code de droit canonique a confirmé la tradition canonique de l'universalité de l'ordre judiciaire (*ordo iudiciarius*). C'est ainsi que la loi procédurale de l'Église est surtout de type universel bien que certaines lois procédurales particulières soient autorisées par le législateur suprême. De plus, dans la pratique, même si de nombreuses questions qui surgissent lors d'un procès sont soumises à la décision du juge tel qu'indiqué par la loi, ce dernier doit observer ce droit procédural ainsi que la jurisprudence commune de l'Église. Le Tribunal suprême de la signature apostolique veille régulièrement au bon fonctionnement de la justice pour toute l'Église, tandis que la vigilance de l'évêque est essentielle pour le tribunal dont il est le modérateur.

Introduction

A seemingly common experience among students of canon law, at least in North America, is the discovery or confirmation of the suspicion that there is a considerable disparity between what is learned in the course(s) on the judicial process and what is observed in the daily activity of diocesan and interdiocesan tribunals. There does indeed seem to be a perpetual tension between law and praxis in this respect, if not in others. This may be a result of certain lacunae or imperfections in the legislation; but this is not the presumed immediate explanation.

Legislation is general and abstract, but its implementation is particular and concrete, thus demanding integration into the local and personal circumstances of the particular circumscriptions of the Church. This usually results in an ecclesial organ being marked with the human culture of those participating in it, but it can unfortunately also reflect the limitations of the latter, including sometimes even the will not to observe the norm of law in some respect. What should be sought by those involved in the governance of the Church and the administration of justice is the fullest local manifestation of what is stated in her sacred discipline. For people of faith, this is a goal worthy of pursuing continually; for it ensures that the Church herself will be discovered in the institute itself and its activity. And in this way its activity promotes the unity of the Church, being rooted in her doctrine and sacred discipline, and thereby contributes to the ultimate goal of the *salus animarum*.

This is a matter worthy of deeper reflection and even justification. The Church's judicial order (*ordo iudiciarius*) is indeed (meant to be) marked with the character of universality. In order to explore this concept, it is necessary first to identify a certain tendency arising at the time of the celebration of the Second Vatican Ecumenical Council according to which decentralization in judicial matters began to be promoted. This is a tendency that perdures. Then, the universality of the Church's administration of justice will be explored, in regard to its regulation, its practical implementation, and vigilance over it.

1 — *The Tendency toward Decentralization in Judicial Matters*

The last century witnessed a new spirit in the Church that, among other things, began to question the need for a unity in the manner of administering justice in the Church. This was observed not only in the first assembly of the synod of bishops and in the revision of the *Codex Iuris Canonici* but already during the celebration of the Second Vatican Ecumenical Council.

That Council imparted no teaching or discipline pertaining to canonical procedural law. However, procedural law did receive some attention during the conciliar sessions themselves. In the 19 July 1963 schema of the *Decretum de matrimonii sacramento*, there was a chapter on the matrimonial process. That schema envisioned no remission of regulation of the process itself to particular law. It only made three references to local authorities or structures: the erection of regional or interdiocesan tribunals, the approval of procurators and advocates by the ordinary, and the local regulation of payment of the latter (no. 15). All other matters were to be given a general treatment, whether by the Council or eventually by the revised Code. For the schema framed the Council's fundamental concern in these terms: "so that it may solicitously protect the stability and sanctity of the contract and sacrament of marriage and the eternal salvation of those who have either contracted marriage invalidly or find themselves obliged by a dissoluble bond to the detriment of their soul."¹ This obviously was (and is) a grave concern of a general or universal scope, one which did not spontaneously suggest many local or particular variations.

Nevertheless, certain observations were made by members of the college of bishops about this schema, which, in one way or another, began to question the universality of the Church's *ordo iudiciarius*. These are worthy of note, even if the conclusion eventually reached was that the resolution of such questions was not the burden of the Council but rather of the commission to be entrusted with the revision of the Code of Canon Law.²

The president of the Canadian conference of bishops, together with Canadian *periti*, expressed his desire to suggest a Canadian tribunal of third instance. The Archbishop of Fribourg also thought diocesan tribunals should be able to function at the third level of jurisdiction—not as a favor but by law. Some bishops of the Indonesian conference of bishops thought the norms of the process should "leave many things to diocesan superiors, such as bishops or conferences of bishops." The Archbishop of Marseille suggested that conferences of bishops should be given the authority to propose alterations to the process to the Apostolic See, which may approve them. An auxiliary bishop of Buffalo (New York, U.S.A.) thought that first instance tribunals "could be given greater freedom in the manner of processing cases"

¹ See *Acta synodalia Sacrosancti Concilii Oecumenici Vaticani II. Pars VIII: Congregationes generales CXXIII-CXXVII. Sessio publica V*, vol. III/8, Vatican City, Typis Polyglottis Vaticanis, 1976, 1078-1079; quotation from the preamble to chapter V "*De processu matrimoniali*."

² Cf. "Appendix. Relatio de laboribus a Commissione Conciliari de Sacramentorum disciplina peractis," 27 April 1964, in *ibid.*, 1158, at 4 d).

and that the treatment of causes at the third level of jurisdiction “should not be limited to the Holy Roman Rota. Courts of the Third Instance could be established around the world in appropriate ecclesiastical territories, under the vigilance of the Rota itself or the territorial Conference of Bishops.”³

While these suggestions would not be treated further by the Council itself, they were echoed a few years later during the first general assembly of the Synod of Bishops in 1967. During that event, the Cardinal Archbishop of Sydney suggested national or regional third instance tribunals. The Archbishop of Lusaka (Zambia) questioned the need for centralizing procedural law. The then-Bishop of Osaka (Japan) thought that conferences of bishops ought to have the faculty to issue norms about tribunals, judges and formalities. The Cardinal Archbishop of Munich and Freising held that procedural law must be the same for the whole Church, unless serious reasons suggest otherwise. At the same time, he encouraged third instance tribunals at the level of the conference of bishops, without prejudice to the right to appeal to the Apostolic See.⁴ As a result, some of these proposals were weighed by the consultors in the *Coetus de processibus*, some of whom would propose that there be a general canon remitting legislative competence in regard to trials to the conference of bishops.⁵ Also, two fathers of the 1981 plenary

³ Cf. *ibid.*, 1103, 1141, 1142, at nn. 55, 57, 113, 114 (“De Tribunalium circumscriptione”); 698 and 699, at nn. 1 and 3 (*sub* “*Tribunal procedure*”), respectively.

⁴ Cf. Giovanni CAPRILE, *Il Sinodo dei vescovi: prima assemblea generale (29 settembre-29 ottobre 1967)*, Rome, Edizioni “La Civiltà cattolica,” 1968, 94, 102, 104, 106, at nn. 1, 16, 19 and 3, respectively (= CAPRILE, *Il Sinodo dei vescovi*).

⁵ See, e.g., “Votum primi Consultoris,” 17 February 1974, in *Comm*, 41 (2009), 111-112, at B; “Votum secundi Consultoris,” 26 February 1974, in *ibid.*, 120-121, at B); “Votum quinti Consultoris,” in *ibid.*, 139, at 2; “Votum sexti Consultoris,” 28 January 1974, in *ibid.*, 147, at V. For support of bringing these wishes to realization, see Javier OCHOA, “Cuestiones de ‘iure condendo’ en materia procesal,” in *Curso de derecho matrimonial y procesal canónico para profesionales del foro* (3), Bibliotheca Salamanticensis, Estudios 22, Salamanca, Universidad Pontificia, 1978, 220-222.

To another, this did not seem necessary (cf. “Votum tertii Consultoris,” 14 February 1974, in *Comm*, 41 (2009), 126, at B.). Another deemed it to be too grave a proposal to resolve without deep study and discussion (“Votum quarti Consultoris,” 14 January 1974, in *ibid.*, 137, at b). In the end it was not admitted, because the Secretary of State considered the value of conference-competence to derogate from universal procedural law to be “exaggerated.” For “the canonical process must be uniform for the whole western Church,” not least because it would unduly burden the Roman Rota—the universal appellate tribunal—to have to come to know the particular procedural laws of the whole Church (see SECRETARY OF STATE, Letter, *Allegato*, Prot. N. 309090, 14 July 1976, in *ibid.*, 177-178, no. 1). This was admitted by the Pontifical Commission, weighing the Church’s “experience of these last years,” i.e., during which several bodies of particular procedural law had been approved and introduced many difficulties (cf. Pericle FELICI, Letter, Prot. N. 3856/76, 14 September 1976, in *ibid.*, 180-181, no. 1); this

congregation of the Code commission (Cardinal Carter of Toronto and then-Archbishop Bernardin of Cincinnati) advocated for a regional or national derogation from the obligatory examination of a declaration of nullity of marriage by the appellate tribunal.⁶

Aspects of judicial decentralization were also favored by some canonists. For example, in May 1968 at an international gathering of canonists under the auspices of the Pontifical Commission for the Revision of the Code of Canon Law, Father Zaccaria Varalta defended the decentralization of the third level of jurisdiction in the Latin Church, such that regional tribunals could be competent in third instance. He seemed dismissive of the fact that this would result in “the diminished ability of the Sacred Roman Rota to direct and establish a common jurisprudence for the good of the administration of justice.” He apprized more highly the benefits of saving time and money, and found support also in the application of the principle of subsidiarity, relief for the Rota, and the recognition of territorial jurisdiction at the level of the conference of bishops.⁷

Much more radical was the position expressed in October 1968 at a gathering of canonists and other academics held in Washington, D.C.—a “Symposium on a Declaration of Christian Freedoms.” It issued a statement in which, after asserting the human origins of the Church’s constitutional organization, it called for the reform of various procedures within the Church. In this context it declared: “It is obvious ... from the legal experience of mankind and from the silence of the New Testament about any comprehensive blueprint of due process, that there is no reason for a single system of procedure, in local and regional matters, throughout the universal Church. Cultural variations are necessary and desirable.”⁸ It was likely some participants in that meeting who collaborated in or at least supported the drafting of the particular procedural

resulted in several revisions (see “Esame delle osservazioni della Segreteria di Stato allo schema di Diritto Processuale,” 10 September 1976, in *ibid.*, 191-193).

For a detailed analysis and commentary, see Thomas J. GREEN, “Subsidiarity during the Code Revision Process; Some Initial Reflections,” in *Jur*, 48 (1988), 790-796.

⁶ Cf. *Congregatio plenaria diebus 20-29 octobris 1981 habita*, Acta et documenta Pontificiae Commissionis Codicis Iuris Canonici recognoscendo, Pontifical Council for the Interpretation of Legislative Texts (ed.), Vatican City, Typis Polyglottis Vaticanis, 1991, 102-104.

⁷ Cf. Zaccaria VARALTA, “De principio subsidiarietatis relate ad ordinandam administrationem iustitiae in Ecclesia,” in PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO (ed.), *Acta conventus internationalis canonistarum, Romae diebus 20-25 maii 1968 celebrati*, Vatican City, Typis Polyglottis Vaticanis, 1970, 346-347 (= VARALTA, “De principio subsidiarietatis”).

⁸ “Towards a Declaration of Christian Freedoms,” in *Jur*, 29 (1969), 6-7. It stated that the conflicts that arose in the critical responses to publication of Paul VI’s encyclical letter *Humanae vitae* is a sign of the lack of sufficient procedures in the Church (*ibid.*, 5).

law for the tribunals of the U.S.A. soon to be approved by the Apostolic See, which was not the only such body of norms.

Indeed, on 28 April 1970, Pope Paul VI, “having considered the particular needs of their [the U.S. bishops’] territory,” approved particular procedural law for the territory of the United States of America, which contained several well-known exceptions to the universal law in treating causes of nullity of marriage.⁹ In the letter by which the Apostolic See informed the American bishops about the cessation of the so-called American Procedural Norms on 1 July 1974, it expressed concern about the use of particular procedural laws in diverse nations, saying that, when an exception is made for one, it cannot easily be denied to another. In fact, it had already been granted to several: particular law was approved for Belgium on 10 November 1970,¹⁰ for England and Wales on 2 January 1971,¹¹ and for Canada and Australia on 1 November 1974.¹²

This favorable posture toward normative-procedural decentralization was presented even in more recent years by an influential American canonist. Resting on a certain conception of the summary process, an anonymous document from 1869, and a critique of the *ius vigens*, Lawrence Wrenn wrote that “*procedural law does not demand uniformity.*” He supported the notion that there are as many “legitimate procedural styles” as there are tribunals and espoused a “certain openness to local practice in tribunal procedures.”¹³ This all echoed his question posed just after the promulgation of the *CIC*: “Should a marriage process be absolutely universal in every detail or should local circumstances be allowed to prevail in certain areas?”¹⁴

Defenses of particular procedural law are not confined to the discussions of bishops at a council or synod and academics at conferences. The toleration

⁹ COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, rescript *Attentis precibus*, Prot. N. 3320/70, 28 April 1970, in Ignacio GORDON and Zenon GROCHOLEWSKI (eds.), *Documenta recentiora circa rem matrimonialem et processualem cum notis bibliographicis et indicibus*, vol. 1, Rome, Pontificia Universitas Gregoriana, 1977, 243-252 (collection hereafter *DR*, vol. 1 or 2 [Zenon GROCHOLEWSKI (ed.), 1980]). For some norms of implementation, see vol. 2 of *DR*, 121-125.

¹⁰ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Prot. N. 805/70 VT, 10 November 1970, in *DR*, vol. 1, 256-257.

¹¹ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Prot. N. 945/70 VT, 2 January 1971, in *DR*, vol. 1, 257-259.

¹² Jean VILLOT, 1 November 1974, in *DR*, vol. 1, 259-260. For some norms of implementation given by the Apostolic Signatura, see *DR*, vol. 2, 126-129 (for Canada) and 129-132 (Australia).

¹³ Lawrence G. WRENN, “The Life, Death and Possible Resurrection of the Summary Process,” in *Jur*, 67 (2007), 520-534, at 534 (= WRENN, “The Life, Death and Possible Resurrection of the Summary Process”).

¹⁴ Lawrence G. WRENN, “In Search of a Balanced Procedural Law for Marriage Nullity Cases,” in *Jur*, 46 (1986), 602-623, at 622 (= WRENN, “In Search of a Balanced Procedural Law”).

of particular procedural law in the 1970s has had a lasting influence on ministers of justice, resulting even in elements of judicial praxis *contra legem* still today in our tribunals. “[S]ome tribunals tenaciously follow and defend practices contrary to the clear prescripts of canon law or fundamental principles of the procedural dialectic.”¹⁵ Apart from anecdotal evidence that could be rehearsed here, there are also countless authoritative interventions that have been made over time to address this problem. The previous and current Prefects of the Apostolic Signatura have acknowledged the problem as well in various settings. For example: “In regard to the United States, for example, too often the Apostolic Signatura has seen concrete evidence that some tribunals continue to follow anomalous procedures which apparently date back to the time of the Special Procedural Norms in effect in the United States from 1970 until 1983, and which even under that particular legislation would have represented dubious practices.”¹⁶ And: “Much harm has been caused and is still today caused by left-handed attempts to introduce into the text of the law exceptions which are different from *what happens the majority of the time*, or to leave to the individual discretion of the minister of a local tribunal the decision to depart from the general procedural rule in a particular cause.”¹⁷ Also, such concerns were expressed by the Apostolic Signatura to the leadership of the Canon Law Society of America in its visit to the Supreme Tribunal in early 2010: “[Then-]Bishop [Frans] Daneels expressed concern about a statement made by the CLSA officers during the 2008 visit to the Apostolic Signatura that some tribunals in the United States have not accepted *Dignitas connubii*. He also noted that the argument that the American Procedural Norms have obtained the status of customary law is fallacious. He encouraged tribunals to follow procedural law faithfully.”¹⁸ And one decree of the Roman Rota stated explicitly in one cause it was handling that one of the tribunals involved “seems not to have appropriately remembered that the special faculties once granted to the Tribunals of the United States of America have been abrogated by the new Code of Canon Law in force.”¹⁹

¹⁵ See Zenon GROCHOLEWSKI, “Cause matrimoniali e ‘modus agendi’ dei tribunali,” in *EIC*, 49 (1993), 150, no. 2.

¹⁶ Raymond Leo BURKE, “Ongoing Challenges in the Administration of Justice,” in *SCL*, 9 (2013), 84.

¹⁷ See Dominique MAMBERTI, “‘Quam primum, salva iustitia’ (c. 1453). Celeridad y justicia en el proceso de nulidad matrimonial renovado,” in *Ius Communio*, 4 (2016), 199 (= MAMBERTI, “Quam primum, salva iustitia”).

¹⁸ *Canon Law Society of America Newsletter*, June 2010, 1.

¹⁹ See TRIBUNAL OF THE ROMAN ROTA, decree c. Ragni, *Duluthen., Nullitatis matrimonii; Nullitatis sententiae et decreti confirmatorii*, 13 December 1990, in *RRT Decr.*, 8 (1990), 215, no. 7.

The individual recommendations of council and synod fathers and consultants to the Code Commission, and attitudes supporting local praxes and jurisprudences, may seem to have little in common. In fact, though, they are all aspects of an inclination to localize or particularize the normative material that governs the administration of justice. Their diversity is due to the fact that they would amount to a possible decentralization of the judicial function in regard to any one of the three powers of governance (cf. c. 135).²⁰ That is, it is a matter of whether the legislation governing judicial activity can be entrusted to local authorities, whether judicial praxis and jurisprudence can be determined locally, and whether the administrative vigilance over this activity can be fulfilled locally.²¹ As will be demonstrated below, each of these dimensions is necessarily endowed with the character of universality. At the same time, the discipline of the Church attributes a certain degree of direction also to the competent local authority.

2 — *The Universality of Procedural Legislation (Normative Activity)*

The order of proceeding for the administration of justice in the Church (the *ordo iudiciarius*)²² is something fundamentally universal in canonical tradition. The expression “*ordo iudiciarius*” evokes the historical moment in which rules of Roman procedural law were scientifically organized and received into the universal governance of the Church. Once the Gregorian reforms had come into effect, announcing in particular the right of all the

²⁰ Unless otherwise noted, the canons cited in this article are taken from the 1983 *CIC*.

²¹ Ignacio GORDON explicitly identifies two of these and alludes to the third in his “*De nimia processuum matrimonialium duratione. Factum — Causae — Remedia*,” in *Per*, 58 (1969), 671, no. 165; cf. 732-733, nn. 305-306 (= GORDON, “*De nimia processuum matrimonialium duratione*”). Joaquín LLOBELL underscores four dimensions: 1) the organic decentralization observed in the capital offices of Roman Pontiff and diocesan bishop and in their relative tribunals, 2) normative centralization, 3) centralization of certain *materiae litis* (e.g., contentious-administrative recourse, nullity of sacred ordination), and 4) the functional centralization of appellate jurisdiction in the designated appellate tribunals (cf. his “*Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale*,” in *IE*, 3 (1991), 435-437; = LLOBELL, “*Centralizzazione normativa processuale*”).

²² For more primitive uses of this and similar expressions, see Linda FOWLER-MAGERL, “*Ordines iudicarii*” and “*Libelli de ordine iudiciorum*” (*From the Middle of the Twelfth to the End of the Fifteenth Century*), *Typologie des sources du Moyen Âge occidental*, Turnhout, Brepols, 1994, 16-28.

faithful to appeal to the Successor of St. Peter,²³ the apostolic chancery had to find some defined manner of proceeding for all the appeals that were being transmitted to it. Haimeric, the chancellor of Pope Innocent II (1130-1143), weighing the renaissance of the study of Roman law, wrote to the jurist Bulgarus in Bologna, requesting direction on how to proceed in the causes deferred to the Roman Pontiff. What Bulgarus gave in reply was an *ordo iudiciarius*—that is, a scientific arrangement and explanation of procedural rules of Roman law for the use of judges. Other scholars would prepare their own *ordines iudicarii*, which gave birth to a whole body of specialized literature. These *ordines* were attempts to lay out the principles, elements and evolution of the judicial process and treat particular procedural questions that the scholar found more urgent or interesting.²⁴

Apart from this primary, scientific sense of the expression, one finds that the *ordo iudiciarius* was being authoritatively identified as a juridical institute in its own right. Thus, when a controversy would be deferred to the Roman Pontiff for judgment, he would at times entrust the judgment of the cause to local authorities. And in the papal rescript, it would in one way or another be stipulated that the local authority was to judge the matter, not merely according to a self-styled manner of proceeding or his own prudent discretion, but according to the *ordo iudiciarius* or the *ordo* or *forma iuris*.²⁵

²³ “Quod nullus audeat condemnare apostolicam sedem appellantem” (GREGORY VII, *Dictatus Papae*, 1075, in Giovanni Domenico MANSI (ed.), *Sacrorum Conciliorum nova, et amplissima collectio*, vol. 20, Venice, Antonio Zatta, 1775, 169).

²⁴ Cf. Kenneth PENNINGTON, “The Jurisprudence of Procedure,” in Wilfried HARTMANN and Kenneth PENNINGTON (eds.), *The History of Courts and Procedure in Medieval Canon Law*, History of Medieval Canon Law, Washington, D.C., The Catholic University of America, 2016, 125-159, esp. 125-131 (= PENNINGTON, “The Jurisprudence of Procedure”; book hereafter *The History of Courts and Procedure in Medieval Canon Law*); Alfons Maria STICKLER, “*Ordines iudicarii*,” in Raoul NAZ (ed.), *Dictionnaire de Droit Canonique*, vol. 6, Paris, Librairie Letouzey e Ané, 1957, 1132-1143.

²⁵ Cf. PENNINGTON, “The Jurisprudence of Procedure,” 135-137. He cites a collection of previously unpublished 12th century decretals in which observance of the *ordo iudiciarius* was stressed by the Roman Pontiff. See “*Decretales ineditae saeculi XII.*” *From the papers of the late Walther Holtzmann*, Stanley CHODOROW and Charles DUGGAN (eds.), *Monumenta Iuris Canonici — Series B: Corpus Collectionum*, Vol. 4, Vatican City, Biblioteca Apostolica Vaticana, 1982 (= *Decretales ineditae saeculi XII.*). In the latter, we see the expression used in different ways. (1) A member of the faithful was to be excommunicated if he refused to appear for judgment and tried to take possession of a priory’s property “*absque ordine iuris*”; interestingly, Alexander III urged the local bishop to hear the parties and to make a judgment within 40 days (30-31, no. 17). (2) If the King of England wanted to accuse a subdeacon suspected of murder, the same pope decreed that he was to try him “*coram ecclesiastico iudice ordine iudiciario*” (59, no. 35). (3) The same pope urged the local bishop to ensure that one particular cleric not harass another in regard to the latter’s

This promoted the development of a universal *ordo iudiciarius* established by the authority of the Roman Pontiff—if not at first by law, then by this consistent administrative praxis pertaining to the administration of justice in the Church. It would soon be synthesized in some clearly legislative forms, including canon 8 of the Fourth Lateran Council (*Qualiter et quando*)²⁶ and of course in the Decretals of Pope Gregory IX and the subsequent developments. Papal decretals and general legislation on the *ordo iudiciarius* would generate new literature by scholars, who would thus develop or enrich their own treatises on the *ordo iudiciarius*. As is verified in other areas of ecclesiastical discipline, doctrinal insights and the treatment of new controversies (jurisprudence) would have influence on future legislation.

Drawing from the literature and the universal law, historians illustrate that the common steps in the Romano-canonical process were quite similar to the ordinary contentious process in the Church's current legislation. It included a petition, citation, *litis contestatio*, instruction, publication of the proofs, arguments, a definitive sentence, and appeals. However, some of these moments were so dynamic and unpredictable as to give an occasion for natural delays and even delay tactics. Three such moments stand out.

- 1) When the parties appeared after receiving the citation, the petitioner read his *libellus*. If the parties had procurators, the mandates were read. At this moment, the respondent could present a counter *libellus* (*libellus reconventionalis*), and exceptions could be presented during this session.
- 2) In the instruction of the cause, the judge established three time periods within which the petitioner could make assertions (*positiones*) and introduce supporting witnesses. The respondent had the right to make an objection (*exceptio*) to the witnesses and their assertions. If an objection were admitted, the judge would give the respondent about three time periods for challenging the petitioner's *positiones* with his own proofs. The petitioner could then make a reply (*replisatio*) to the respondent's objections and be given time periods to

canonical possession of a church "*absque ordine iudiciario*" (81, no. 46). (4) A cleric whose goods were taken when he was making recourse to the pope was not to be aggrieved "*citra formam iuris*" (112, no. 65). (5) One man's goods were not to be seized by church authority "*sine manifesta et in iudicio publice probata causa*" (132, no. 77). (6) The local authority was given this command in regard to one to whom a church was to be assigned: "*nec eum super eadem molestari sine ordine iudiciario permittatis*" (137, no. 80).

²⁶ See "Concilium Lateranense IV — 1215 [Concilii quarti Lateranensis constitutiones]," in *Conciliorum oecumenicorum generaliumque decreta. Editio critica*, vol. II/1, Turnhout, Brepols Publishers, 2013, 171-172.

support it. Witnesses presented for any of these purposes were questioned according to the *articuli* presented by the one that introduced the witness and the questions proposed also by the other party.

- 3) After the publication of the acts, further proofs were, in principle, not admissible but could be admitted through various procedural maneuvers. A common practice was to accuse a witness of perjury after the publication of the acts. This was essentially a new *positio*, which could be supported with new proofs. This then gave occasion for a new *exceptio* and *replicatio*, according to what was described above.²⁷

It seems that the prolonged instruction of the cause and all the associated expenses were what especially gave rise to the adoption of summary forms of the process. In this regard, there existed different local procedural practices, especially various uses of the oath as a means of proof.²⁸ Such a summary form was in fact approved and promulgated for the whole Church by the Roman Pontiff himself in the constitution *Saepe*,²⁹ in which Clement V encouraged judges to curtail these moments in the process of live debate and layers of mutual objection that could easily become prolonged and burdensome for the parties and the tribunal. That form in effect supplanted the *ordo iudiciarius* (or Romano-canonical process) for various contentious causes, including matrimonial causes, since experience taught that the harmful prolonging of trials resulted “from the meticulous observance of the judicial order” (“*ex subtili ordinis iudicarii observatione*”).³⁰ Thus the summary process, which involved full respect for the parties’ right of defense, became, in a manner of speaking, the *novus ordo iudiciarius*³¹ for such contentious causes.³²

As was explained in section 1 *supra*, Wrenn has tried to defend local variety in procedural law on the basis of this pontifical institution of the summary process. A major source for him is the just-cited Appendix to an

²⁷ Cf. Charles DONAHUE, Jr., “The Ecclesiastical Courts: Introduction,” in *The History of Courts and Procedure in Medieval Canon Law*, 277-283.

²⁸ Cf. *ibid.*, 284-287.

²⁹ Clem. V, 11, 2.

³⁰ Clem. II, 1, 2.

³¹ “Constitutio *Saepe* potius quam existentem processum reformare, novum ordinem iudicium induxit, qui, proinde, respectu ordinarii *summarius* appellatus est” (Francesco ROBERTI, *De processibus*, vol. 1, Rome, Pontificium Institutum Utriusque Iuris, 1941, 9).

³² “Omnia autem fere ecclesiastica iudicia hodiernis diebus in curiis, agi possunt forma summaria [...] praeter causas Clericorum stricto sensu criminales, vel praeter causas de beatificatione et canonizatione Servorum Dei” (SACRED CONGREGATION OF THE COUNCIL, *Separationis tori*, decree, “Appendix I,” 31 July 1869, in ASS, 5 (1869-1870), 40; = “Appendix I”).

1869 decree of the Sacred Congregation of the Council, which accepts the diverse practices found in local tribunals to be legitimate canonical forms.³³ However, that comment—which is more likely alluding to the legitimate *stylus curiae* existing in any tribunal, the *stylus formalis iudicialis*³⁴—is arguably taken out of context. In the first place, the context is one of encouragement to local curias that lacked experience with the judicial process and were overwhelmed in trying to understand and observe the *ordo iudiciarius*: they could rest assured with observing the summary process and, in such circumstances, trust also in their local praxis. Moreover, the same Appendix proceeds to declare elaborately what is essential to the summary process, which still clearly was to include the following in all tribunals: the petition (whether orally or in writing), the citation, a less formal *litis contestatio* than was described above, oaths, interrogations and other proofs, defenses, a conclusion in the cause, and a written sentence.³⁵

Wrenn also thought some summarized process, as exemplified perhaps by the American Procedural Norms,³⁶ was to be created for causes of nullity of marriage. This, however, would not seem to be the vision of that Appendix which he cites for support, since the latter conceives of matrimonial causes as “ecclesiastical causes which demand special solemnities ... even if they are treated summarily.”³⁷ His promotion of local forms may sound harmless in itself; but the consequences of tolerating such local diversity can only be assessed after one has been explicit about how far that reaches. The *mos Americanorum* (“*il modo americano*”) has reached beyond particular judicial praxis and impacted the very defense of the matrimonial bond, the integrity of proofs, the gravity of the function of judging, and the real understanding and application of the notion of moral certitude. These are all serious substantive consequences, not minor points such as how to record the arrival of *libelli* or the specific length of advocate briefs.

It also should not be thought that the summary process was intended to make way for local variation and inventiveness. The *ordo iudiciarius* was something that allowed for the possibility of local praxis but which was

³³ Cf. his “In Search of a Balanced Procedural Law,” 613-618; IDEM, “The Life, Death and Possible Resurrection of the Summary Process,” 530.

³⁴ Cf. GOMMAR MICHIELS, *Normae generales juris canonici. Commentarius Libri I Codicis juris canonici*, vol. 1, 2nd ed., Tournai, Desclée, 1949, 625-627.

³⁵ Cf. “Appendix I,” 42-43.

³⁶ Cf. his “In Search of a Balanced Procedural Law,” 618-619.

³⁷ See “Appendix I,” 49.

fundamentally a unified and consistent form of proceeding. Helmholtz explains:

The procedural tradition of the *ius commune* left room for variation among the courts—the so-called *stylus curiae*. [. . .] But it is not wrong to speak of a unity in its procedural system overall. The *ordo iuris* promoted a basic consistency in the settlement of disputes, gave rise to a common law of proof, and called into being a conception of due process of law that has been of real significance in the Western legal tradition. The law of civil procedure in the *ius commune* had an organic character, one capable both of growth and of admission of regional differences, while it still retained the same roots and basic shape. It kept a recognizable identity in places that were geographically very far removed from each other. It kept a fundamental identity across centuries.³⁸

The ecclesiastical heir of the classic and summary forms of the *ordo iudiciarius* is what is codified in the *CIC* and *CCEO*,³⁹ and in particular the *pars dynamica* of the ordinary contentious trial. That is the standard form of the judicial process in the Church and is what is to be observed for most

³⁸ Richard H. Helmholtz, *The Oxford History of the Laws of England. Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford, Oxford University Press, 2004, 313.

³⁹ The immediate source for these is essentially what was codified in the *CIC/17*. Wernz had even proposed “*de processu sive procedura sive ordine iudiciario*” as a heading for that section in the future Pio-Benedictine Code (“Verbali della Commissione circa la suddivisione delle materie (17 aprile 1904-28 giugno 1904),” in Joaquín LLOBELL, Enrique DE LEÓN and Jesús NAVARRETE, *Il libro “De processibus” nella codificazione del 1917. Studi e documenti. Vol. I: Cenni storici sulla codificazione “De iudiciis in genere,” il processo contenzioso ordinario e sommario, il processo di nullità del matrimonio*, Monografie Giuridiche 15, Milan, Giuffrè Editore, 1999, 325; = *Il libro “De processibus” nella codificazione del 1917*). And he used the expression freely in his writings (see, e.g., Franz WERNZ and Peter VIDAL, *Ius canonicum. Tomus VI: De processibus*, Rome, Universitas Gregoriana, 1927, 3-9: “Fontes canonici ordinis iudiciarii”). In a 1907 *votum*, Fischer mentions in passing the Church’s judicial order (*Ecclesiae ordo iudicialis*; cf. *Il libro “De processibus” nella codificazione del 1917*, 538). And the schemata from 1907-1909 identified the standard judicial structures and manner of proceeding in these terms: “*iuridica forma servata*” (ibid., 426, 450, 478, 512, 754 at *Can. 1*).

By the time of the first codification, the goals of greater simplicity and relative swiftness were beginning to be seen as integral even to the ordinary process. Every process in the Church’s judiciary was to be free of unnecessary elements from the Romano-canonical process. Accordingly, a separate “summary process” as an ordinary manner of proceeding was no longer necessary. We read in the 1907 *votum* of Otto Fischer: “E contrario ius canonicum iam pridie enixe studuit minuere iudicia eaque constituere simpliciora. [...] Quare iudicium ordinarium ad formam quam simplicissimam redigendum, iudicia vero summaria non amplius admittenda esse iudico atque propono” (ibid., 546-547). For the discussion on this proposal, which would prevail, see ibid., 1108-1109.

causes of nullity of marriage (*CIC* c. 1691, §3; *CCEO* c. 1377, §3), most penal causes (*CIC* c. 1728, §1; *CCEO* cc. 501, §4; 1471, §1),⁴⁰ and causes of nullity of sacred ordination (*CIC* c. 1710; *CCEO* c. 1386, §2). Other causes that may be handled using abbreviated or special forms of the process remit to it under certain circumstances.⁴¹ The expression *ordo iudiciarius* is also taken up by the current proper law governing the Supreme Tribunal of the CDF and the Tribunal of the Roman Rota.⁴²

In accord with the canonical tradition alluded to above, and as doctrine recognizes,⁴³ it is the consistent discipline of the Church that the norms governing ecclesiastical trials bear the fundamental mark of universality. This is given positive expression according to these terms: “*Omnia Ecclesiae tribunalia reguntur canonibus qui sequuntur*” (*CIC* c. 1402) and, more specifically for causes of nullity of marriage, “*iure processuali Codicis Iuris Canonici et hac Instructione [Dignitas connubii]*” (*DC* art. 1, §2). The apostolic tribunals have special or proper procedural law; but apart from these, “[c]etera tribunalia servare debent praescripta canonum qui sequuntur” (*CIC/17* c. 1555, §2). This extends also to general administrative norms in procedural matters, since they foster “a certain uniform application of the law, as well as respect for a certain variety, by references which are made to praxis and to jurisprudence and to necessary clarifications.”⁴⁴

The unitary character of procedural law was clearly within the vision of several members of the college of bishops, who expressed their mind about its first codification. What one discovers from the 1904 consultation is a repeated

⁴⁰ Cf. CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normarum mutationes introductae in M.P. “Sacramentorum sanctitatis tutela,”* 21 May 2010, in *Comm*, 42 (2010), 344, art. 31 (hereafter *CDF Normae*).

⁴¹ Cf. *CIC* cc. 1656, §1; 1670; 1687, §§1 and 4; 1690; 1693, §1; *CCEO* cc. 1343, §1; 1356; 1373, §§1 and 4; 1376; 1379, §1 (the canons pertaining to the marriage nullity process, here and throughout this article, are drawn from the two *motu proprio*s reforming it: see FRANCIS, mp *Mitis Iudex Dominus Iesus*, 15 August 2015, in *AAS*, 107 (2015), 958-970; mp *Mitis et misericors Iesus*, 15 August 2015, in *ibid.*, 946-957); BENEDICT XVI, mp *Antiqua ordinatione*, 21 June 2008, in *AAS*, 100 (2008), 534 and 538, artt. 104 and 122 (hereafter *LP*).

⁴² *CDF Normae* (at 338 and 341): “*Pars Altera. Normae processuales. [. . .] Titulus II: De ordine iudiciario*”; TRIBUNAL OF THE ROMAN ROTA, norms *Quammaxime decet*, 18 April 1994, in *AAS*, 86 (1994), 523: “*De ordine iudiciario Rotae Romanae.*”

⁴³ See, e.g., Carmelo DE DIEGO-LORA, Commentary on Canon 1402, in *Exegetical Comm*, vol. IV/1, 599, at a); GORDON, “*De nimia processuum matrimonialium duratione,*” 676, no. 178, *incipit*; Pio Vito PINTO, *I processi nel Codice di diritto canonico: Commento sistematico al Lib. VII*, Vatican City, Pontificia Università Urbaniana, Libreria Editrice Vaticana, 1993, 24; VARALTA, “*De principio subsidiariorum,*” 348-349.

⁴⁴ See Velasio DE PAOLIS, “*La ‘Dignitas connubii’ può essere modello ed esempio per pensare a qualche cosa di simile per altri settori del diritto canonico?*” in *Per*, 104 (2015), 338.

wish for a common procedural law that could be observed in all diocesan curias. The primary concern was in favor of a simple form of the process, or a form that could be simply understood and implemented. This would then foster its use in all dioceses. The Bishop of Montauban and the Archbishop of Toulouse sought simple and practical procedural norms that could be executed “*in omnibus dioecesisibus*.” The bishops of the Province of Montreal requested a simple manner of proceeding “*in omnibus dioecesisibus observandus*.” Those of the Provinces of Bourges and Lviv wanted simpler forms that “may be observed easily and uniformly in all diocesan curias” (“*ut possint facilius observari et uniformiter in omnibus curiis dioecesanis*”). Similarly, those of the Provinces of Sens and Lima requested that “a new procedural code be prepared” which is “uniform for all ecclesiastical curias” (“*Conficiatur novus codex processualis (...) uniformis pro omnibus curiis ecclesiasticis*”).⁴⁵

Also, notwithstanding some tendencies toward the creation of particular procedural law, some bishops spoke eloquently about the need for a universal procedural law at the first general assembly of the Synod of Bishops in 1967. The Cardinal Archbishop of Caracas (Venezuela) argued in favor of maintaining “at least for the Latin Church, the unity of procedural law; it does not seem that autonomy should be given to regional or national tribunals, while it is just that regional authorities be able to give procedural norms also with inspiration from the procedure in use in civil courts.” The then-Co-adjutor Archbishop of Bangalore, Duraisamy Simon Lourdasamy offered a just caution against an exaggerated application of the principle of subsidiarity to the administration of justice. Decentralization in this matter is not fitting, but it would be better for there to be a “unitary organization essential for the whole Church, with the possibility of minor adaptations.” The Archbishop of Bari (Italy) urged that “the excessive decentralization of procedural law be avoided, so that it not be understood that the same case may be evaluated with two scales and measurements, to the detriment of the administration of justice.”⁴⁶

These interventions influenced some aspects of the fifth guiding principle for the revision of the Code of Canon Law, on the principle of subsidiarity.

In what pertains to procedural law, serious doubts have arisen as to whether or not there is to be admitted in that matter a decentralization (as it is called) that is broader than in today’s discipline, that is, one which extends to the

⁴⁵ See *Il libro “De processibus” nella codificazione del 1917*, 358-359, nn. 6-8, 10. A universal matrimonial process was requested also by the bishops of another region (*ibid.*, 363, no. 52).

⁴⁶ See CAPRILE, *Il Sinodo dei vescovi*, *op. cit.*, 96, 103, 120, at nn. 4, 17 and 6, respectively. For a synthesis of all the arguments proposed in the matter of decentralization in relation to procedural law, see *ibid.*, 129.

autonomy of regional or national tribunals. For it is hidden from no one that local procedural rules in individual nations or regions can have much influence on the ordering of tribunals, their levels, manner of proceeding, the means of proof used in them, and other things. However, on account of the primacy of the Roman Pontiff, it is certainly a true right of any member of the faithful in the whole Catholic world to defer his cause to the Apostolic See for judgment at any level of a trial or in any stage of litigation. It is clearly necessary for the administration of justice to preserve a certain unitary organization of justice at diverse levels; otherwise, an occasion or opportunity would be given to the uncertainty of trials or to offenses and many other disadvantages or to their transmission to the Apostolic See. It is therefore considered necessary that the procedural law of the new Code must assume a broader and more general form; however, individual regional authorities are to be given the faculty to establish Rules or norms to be observed in their tribunals, by which many things are to be defined pertaining to the constitution of tribunals, the office of judges and of other officials of the tribunals, and also the adaptation of the laws of the Code to the character and style of what is in force in individual places. In this matter, there is no doubt that civil procedural law may often stand as an example.⁴⁷

This principle thus envisioned that, apart from remissions to the competence of the diocesan bishop or conference of bishops for establishing particular rules or norms, all other matters of the constitution and manner of proceeding in tribunals “are the object of a total normative ‘centralization’ on the part of the Roman Pontiff”; “the procedural discipline therefore expresses a *normative material reservation* on the part of the Roman Pontiff,”⁴⁸ leaving most aspects of procedural legislation outside the discretionary legislative competence of the diocesan bishop or conference of bishops.⁴⁹

⁴⁷ See PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, “I. Principia quae Codicis iuris canonici recognitionem dirigant,” in *Comm*, 1 (1969), 82-83, at no. 5. This was approved by the synod fathers with a vote of 128 in favor (*placet*), 58 in favor with qualifications (*placet iuxta modum*), and 1 opposed (*non placet*) (*ibid.*, 100).

⁴⁸ See LLOBELL, “Centralizzazione normativa processuale,” 443-444; *IDEM*, *I processi matrimoniali nella Chiesa*, Subsidia Canonica 17, Rome, EDUSC, 2015, 121 (= LLOBELL, *I processi matrimoniali nella Chiesa*).

⁴⁹ In the same sense, see Zenon GROCHLEWSKI, “Guiding Principles of Book VII of the Code of Canon Law,” in *Forum* 10/1 (1999), 73: “In reality, book VII of the Code leaves little room for local legislation. It permits that particular law disposes differently from what is provided for in the Code *only* regarding: [references to particular law in the CIC]” (emphasis added). We read also: “Salvada, pues, la necesaria unidad procesal, el nuevo Código permite la existencia de un, *ciertamente limitado*, derecho procesal particular” (Juan Luis ACEBAL LUJÁN, “Principios inspiradores del derecho procesal canónico,” in Julio MANZANARES (ed.), *Cuestiones básicas de derecho procesal canónico. XII Jornadas de la Asociación Española de Canonistas (Madrid, 22-24 abril 1992)*, Salamanca, Universidad Pontificia, 1993, 27, no. 3, emphasis added).

This was received into the 1976 *Schema* of what would become Book VII of the *CIC*. There we read: "It cannot be denied that the customs of some nations and the civil laws of a place are influential, especially as regards the manner and qualification of means of proof and of judicial acts. On the other hand, in light of the hierarchical structure of tribunals and of the right of the faithful always to defer their cause to the Apostolic See, procedural laws in the entire Church must substantially be in agreement with each other."⁵⁰ The same spirit informed the codification of the procedural law for the Eastern Catholic Churches *sui iuris*. In particular, the commission entrusted with this project stated: "It is desired that all Catholics have the same procedural norms." After the Latin Code had been issued, this principle was described in terms of achieving "the maximum possible conformity with the Latin Code ... maintain[ing] only those differences which are required by the hierarchical configuration of the Eastern Churches and by the particular conditions of the East or [which are] at any rate opportune for a greater comprehension of the Code on the part of Easterners and, in some rare cases, for a greater agreement of the canons and of terminology."⁵¹

The reason for this necessary uniformity is manifold. In the first place (*ratione iuris naturae*), the most basic and essential elements of the judicial process are determined by the nature and dignity of the human person, who has an innate right to defend himself when his goods, his reputation, and his very status are in question. The right to assert something or defend oneself against the claim of another, when peaceful resolution is not possible, demands the intervention of an impartial, authoritative third party—that is, a judge. And it is for the judge to ensure that the right of self-defense practically amounts to respecting each party's ability to knowledge about the process and its evolution and the ability to be given a hearing at all stages. How this is to be carried out both in ordinary circumstances and in unusual

⁵⁰ "Insuper negari nequit quod mores alicuius nationis, leges civiles loci influxum exercent praesertim circa modum et qualificationem mediorum probationis et actuum iudicialium. Ex alia parte, attentis hierarchica structura tribunalium et iure fidelis deferendi semper suam causam ad Sedem Apostolicam, leges processuales in universa Ecclesia debent substantialiter inter se congruere" ("Schema canonum de modo procedendi pro tutela iurium seu de processibus," in *Comm*, 8 (1976), 184, no. 2). This had already been stated in the report prepared by then-Archbishop Sabattani. See "Opera Consultorum in apparandis canonum schematibus. II. De iure processuali recognoscendo," in *Comm*, 2 (1970), 183, no. II.7.

⁵¹ "Si desidera che tutti i cattolici abbiano le stesse norme processuali" (PONTIFICAL COMMISSION FOR THE REVISION OF THE EASTERN CODE OF CANON LAW, "Principi direttivi per la revisione del Codice di Diritto Canonico Orientale," in *Nuntia*, 3 (1976), 9, no. 2); "Breve relazione sui lavori della Commissione dal 15 dicembre 1982 al 15 dicembre 1983," in *Nuntia*, 17 (1983), 73.

ones (e.g., when a party is afflicted with a grave mental illness) are suggested by human nature but wisely determined by juridical tradition. Thus there is a “form which the law of nature demands and equity suggests,”⁵² and there are procedural norms which, in the words of Pope St. Paul VI, “are the fruit of tested experience” in the Church.⁵³

Secondly (*ratione ministerii petri*), the universality of procedural legislation flows from the nature of the Petrine ministry. The Roman Pontiff is the supreme shepherd of the Church on earth, caring for and nourishing her for and with Christ, as His Vicar. It is thus for him, as well as the college of bishops in communion with him as their head, to provide fitting legislation for her, especially in those matters that are necessarily universal in virtue of their relation to the divine positive and natural law. He has long had the understanding, as Alexander III declared around 1175, that “it pertains to our office to preserve the rights of individuals by pastoral solicitude.”⁵⁴ He is the judge of the whole Catholic world, but in the first place he provides universally for the administration of justice in the Church by issuing procedural law that guarantees the judicial protection due to all, including the right of all Catholics to approach him as their judge (cf. *CIC* cc. 1417, §1; 1442; *CCEO* c. 1059, §1).

Thirdly (*ratione potestatis sacrae*), the innate gravity of the judicial function demands that it be regulated according to universal norms. The work of judges, while carried out locally, is not merely a local service carried out for the benefit of individuals in a manner dictated by local culture and customs. It is not merely a participation in the local bishop’s judicial power. Like the ministry of the Word and the sacramental order themselves, it is a function that has been received by the Church from Christ himself.⁵⁵ For he entrusted St. Peter and the other apostles and their successors with the full governance of the Church, including the authoritative resolution of controversies arising among his followers; and their vicarious judges share in the exercise of this authority. The manner in which they conduct themselves must be in accord with the full ecclesial reality of the administration of justice. This has

⁵² See “Appendix I,” 50.

⁵³ See PAUL VI, discourse to the Sacred Roman Rota, 28 January 1978, in *AAS*, 70 (1978), 182.

⁵⁴ “... ad officium nostrum pertinet singulorum iura pastorali sollicitudine conseruare” (*Decretales ineditae saeculi XII*, 81, no. 46).

⁵⁵ Cf., e.g., LEO XIII, encyclical *Immortale Dei*, 1 November 1885, no. 5, in *Fontes*, vol. 3, 238; PAUL VI, discourse to the Most Eminent Cardinal Fathers and to the Consultors of the Pontifical Council for the Revision of the Code of Canon Law, 20 November 1965, in *AAS*, 57 (1965), 986.

implications, then, in every act they place and in the conduct of all the ministers of justice.

Fourthly (*ratione materiae*), universal procedural legislation is demanded by virtue of the fact that many matters that are introduced as the object of litigation before ecclesiastical tribunals are part of the common public good of the Church and therefore ought to be treated in the same manner throughout the world. The object of ecclesiastical trials in practice is usually holy matrimony, which is essential to the immutable nature of the human person and to the sacramental order, or the declaration or imposition of penalties, which are due to those who have gravely disturbed the life of the Church by committing a delict. With regard to marriage in particular, we read: "In regard to marriage, which is among the most serious things entrusted to the care of the Church, it is necessary that the juridical order (*ordo iuridicus*) be general and common."⁵⁶ Indeed, in our time in the western world, the universal protection of marriage is needed now more than ever. For the Church's tribunals are not immune from the influence of our age, which has forgotten the truth about the indissolubility of marriage. Indeed, "a certain mentality has been spread, seen also in judicial praxis, which, in the name of pastoral care and the good of souls, has not employed the necessary rigor in evaluating the motives in favor of the validity of marriage and has proceeded with levity in the declaration of nullity, reversing the canonical principle of the *favor matrimonii* (*in dubio standum est pro valore matrimonii*)."⁵⁷ The greater that the matter being protected may be, the more value is attributed to the law issued for its defense. Thus, "the Church, without falling into juridical formalism, demands a rigorous procedure, also from the formal point of view, wherever it is a question of the protection of the divine law itself, as is the indissolubility of marriage and the sacramentality of marriage." Such rigor is also due in penal causes, which frequently touch upon "the dignity and liberty of the human person."⁵⁸

At the same time, there are some elements of normative particularity in judicial matters. For one can distinguish elements "that are substantial in the process and therefore must be the object of a unitary procedural law" from those elements which are not and which therefore can be left to particular

⁵⁶ See Jean VILLOT, letter to the President of the U.S.A. Conference of Bishops, 20 June 1973, in *DR*, vol. 1, 253, no. 1433. In this letter, the Secretary of State also urged the American tribunals to conform their praxis to the general law of *Causas matrimoniales* and demanded their agreement "*cum communi ordine iuridico*" (*ibid.*, no. 1434).

⁵⁷ See Velasio DE PAOLIS, "La giustizia e la verità nei pronunciamenti giudiziari," in *QSR*, 16 (2006), 17, no. 3.

⁵⁸ See *ibid.*, 29, no. 1.

law.⁵⁹ Accordingly, the supreme legislator attributes some areas of competence to local legislators, which naturally cannot be contrary to higher norms (cf. c. 135, §2).

The principal legislator in question is the diocesan bishop, who is the proper judge of the particular Church and who directs the administration of justice therein. Universal law attributes several areas of competence to him, including the following matters: who may be present during a session before the judge (“*in aula*”) (c. 1470, §1), such as for the concordance of the doubts, the taking of the oath, the interrogation of parties and witnesses, and an oral discussion (cf. cc. 1559, 1534), aspects of the preservation of judicial acts,⁶⁰ the very secure methods for the communication of judicial acts (c. 1509, §1), terms of abatement (c. 1520), the manner of posing questions to parties and witnesses (cc. 1561, 1534), judicial fees (c. 1649, e.g., cc. 1490, 1580), and the authority competent to execute a sentence (c. 1653, §1). He may also issue or approve the tribunal regulations (*ordinatio*),⁶¹ which may arrange for the proper implementation of universal law within the local circumstances, including the precise manner of making the oath to carry out one’s function diligently (c. 1454), the office hours of the tribunal (cf. c. 1468), the professional rights and duties of advocates and procurators,⁶² the length of defenses and observations, the number of copies, “*aliquae huiusmodi adiuncta*” (c. 1602, §3).⁶³

The conference of bishops for its part also enjoys some legislative competence in the area of procedural law, which it issues in accord with the norm of canon 455, §§1-3. It may issue general decrees by which it permits lay

⁵⁹ See GORDON, “De nimia processuum matrimonialium duratione,” 679, no. 187.

⁶⁰ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, general executory decree *Saepe saepius*, Prot. N. 42027/08 VT, 13 August 2011, in AAS, 103 (2011), pp. 626-628; English translation in *StC*, 46 (2012), 473-475.

⁶¹ Cf. *CCEO* c. 1070.

⁶² Cf. SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, decree, Prot. N. 21667/92 VT, 16 June 1990, cited in Agostino VALLINI, “La función pastoral del Supremo Tribunal de la Signatura Apostólica en la vigilancia sobre los tribunales eclesiásticos,” in *Ius Communionis*, 1 (2013), 214, note 27.

⁶³ On areas of “particular normative freedom,” see VARALTA, “De principio subsidiariorum,” 349-350, nn. 2-3. The author includes the manner in which the tribunal is constituted, the citation and the *contestatio litis* communicated, sessions held, acts and defenses communicated, the discussion completed, the division of subsidiary functions, the preparation, transmission and presentation of acts, fees and expenses, and financial direction. Cf., e.g., DE DIEGO-LORA, Commentary on Canon 1402, 598-599, at a); Manuel Jesús ARROBA CONDE, *Diritto processuale canonico*, 5th ed., Rome, Editiones Institutum Iuridicum Claretianum, 2006, 42.

people to be appointed as judges in the territory (c. 1421, §2)⁶⁴ and permits a single clerical judge to be entrusted with causes reserved to a college, apart from causes of nullity of marriage (cf. cc. 1425, §1; 1673, §4).

Additional indications about and models for articulating the proper matter of particular procedural law can be drawn from norms issued by the Apostolic See for regional and interdiocesan tribunals. While such normative activity may be legitimate, there is to be no ambiguity about the binding character of the norm of the universal legislation, especially as regards the definition of titles of competence, the nature of the judicial offices, the nature and purpose of the judicial process, and the essential manner of proceeding. There is wisdom in the caution of one consultor of the *Coetus de processibus*, who deemed it necessary to avoid inclusion of a canon that would leave a general legislative competence in procedural law to the conference of bishops. He stated that, instead, certain areas of normative competence should be listed taxatively in the canons, as they have been. “Otherwise there would be a danger of losing the figure of a juridical process. It would thus turn into having certain ‘pastoral conversations,’ without a proper ground of nullity, without witnesses, and not exclusively before an ecclesiastical judge.” To avoid all of this, “the sphere of particular law is rather to be accurately circumscribed.”⁶⁵

3 — *The Universality of the Administration of Justice* (*Judicial Activity*)

Universal procedural law naturally takes expression in the particular circumstances of an individual tribunal and a concrete trial. There is thus a

⁶⁴ While the new c. 1673, §3 permits a college of judges to be composed of one or even two laypeople, this presupposes that laypeople have been appointed to the office of judge, which may only be done if the conference of bishops has permitted it in virtue of the un-derogated c. 1421, §2. Cf. John P. BEAL, “The Ordinary Process According to *Mitis Iudex*: Challenges to Our ‘Comfort Zone,’” in Kurt MARTENS (ed.), *Justice and Mercy Have Met. Pope Francis and the Reform of the Marriage Nullity Process*, Washington, D.C., CUA Press, 2017, 242-243.

⁶⁵ See “Votum tertii Consultoris,” 14 February 1974, in *Comm*, 41 (2009), 126-127, at B. The Consultor in fact lists and describes 12 particular areas that could be addressed in particular legislation: the manner of selecting judicial vicars and judges, the manner of selecting laypeople for judicial offices, rules of competence and transfer of a cause, causes *iurium* in which civil law can apply, the involvement of the instructor in the college and of the college in the instruction, the appropriate person(s) to carry out the judicial examination, the presence or absence of an advocate at an interrogation, the manner of carrying out the citation, time limits, oral and written elements in the instruction of causes, the same in regard to the discussion of the cause, the manner of communicating the sentence, and time limits for appealing.

necessary particularity in the execution of procedural law, and this is central to the function of judge as the official who applies the abstract law to the concrete case in order to arrive at an authoritative and conclusive act of justice. The abstract law in question may be universal law, as in causes of nullity of marriage and most penal causes, but it may also be particular law (e.g., in causes *iurium* or penal causes pertaining to delicts established by particular law [c. 1315]). Whatever the case may be, the judge is to proceed according to the universal *ordo iudiciarius* of the Church, for the reasons discussed *supra*.

Indeed, the judge is a minister of the Church, not a private dispenser of favors. His administration of justice is carried out in the name of the Church and in accord with her law. “And so, because the judge is called to carry out justice in ecclesial communion, he cannot have any other point of reference than the Church herself, her spirit, her anthropology, her faith, and her laws.”⁶⁶ As an ecclesiastical official, he administers justice in the name of the Church—not merely on behalf of the particular Church but in the name of the universal Church. He thus proceeds accord to her time-tested, venerable procedural standards of justice. The procedural norms are sacred canons insofar as they have been issued by the Vicar of Christ on earth for the protection of sacred things. The authenticity of the ecclesial character of the judge’s service depends, then, on his fidelity to the norm of procedural law.

Practically speaking, it is evident that there must be a consistent manner of proceeding in each hierarchically related judicial instance, or level of jurisdiction. If this consistency were not ensured, there would be prejudice against the right to a multiplicity of instances, or the right to double jurisdiction, which is founded on the right of appeal.⁶⁷ In other words, the faithful would be victims of injustice if their causes were to be treated diversely between the local tribunal and the ordinary appellate tribunal, such that, for example, they enjoy the right to inspect the acts and present arguments before the one but not before the other. The competence of the Apostolic Tribunal of the Roman Rota, which administers justice on behalf of the Roman Pontiff for the universal Church, demands that there be continuity in how causes are handled throughout the Church, for they will be handled in

⁶⁶ See Velasio DE PAOLIS, “Il giudice è la stessa giustizia animata,” in Janusz KOWAL and Joaquín LLOBELL (eds.), “*Iustitia et iudicium*.” *Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, vol. 3, Studi Giuridici 89, Vatican City, Libreria Editrice Vaticana, 2010, 1322-1323.

⁶⁷ Cf. LLOBELL, *I processi matrimoniali nella Chiesa*, 121; IDEM, “Centralizzazione normativa processuale,” 438; GORDON, “De nimia processuum matrimonialium duratione,” 676, no. 178, 1°.

largely the same manner at that highest instance. It is true that the Roman Rota has its own procedural norms (c. 1402); but these are accessible to the whole Church, flow from its apostolic and international character, and are meant to aid with the protection of the right of the faithful to a just process.

Nor can it be persuasively argued that diverse forms of process may be tolerated between one province and another, as if provincial procedural consistency were adequate. The communion of all the Churches, and the communion of life that exists today more tangibly than ever among the faithful from diverse regions of the world, demands a consistent administration of justice throughout the Church. Otherwise, the Church would surrender to a kind of juridical relativism according to which what is just in one region is unjust in another, and vice versa. And in such a situation, one can easily come to realize that “the suspicion of partiality falls upon a minister of justice when he intervenes in a concrete case in a pending process in divergence from the general procedural law.”⁶⁸ A judge who conducts himself in that manner is no longer *iustitia animata* but may be, or appear to be, an organ of arbitrariness and caprice.

This is true also as regards the manner of weighing proofs.⁶⁹ Were each tribunal to have its own self-styled criteria and methods for weighing proofs, parties would be subject to a double standard or inconsistent measure in bearing the burden of proof or combatting allegations of an opposing party. For example, a first instance tribunal may see the use of an expert in a cause of alleged grave defect of discretion of judgment (c. 1095, 2°) as optional or may hastily attribute the force of full proof to the confession of a party, while the second instance tribunal holds different standards: demanding an expert always or examining a confession with a more critical eye. Or one tribunal may be willing to decide either in the affirmative or in the negative, while its ordinary appellate tribunal strives always to issue affirmative sentences except in highly exceptional circumstances. Such inconsistencies betray an arbitrariness or ignorance in the manner of weighing proofs.

By implementing or tolerating these divergent practices, the Church's judiciary would give an occasion for the “flight of causes into those tribunals before which a more ‘benign’ procedural system ... is in force.”⁷⁰ It creates a scale for measuring whether some tribunals are more rigorous and others are *tribunalia favorabiliora*. That should be deeply concerning to ministers

⁶⁸ See MAMBERTI, “Quam primum, salva iustitia,” 199.

⁶⁹ Cf. GORDON, “De nimia processuum matrimonialium duratione,” 676, no. 178, 2°, where the author addresses the problem of a “*duplex mensura*” in weighing a confession.

⁷⁰ Cf. *ibid.*, 677, no. 180. At the ellipses, the author had included the comment, “I dare not say more lax.”

of justice, since it is an indication that there is a perception among the faithful that the Church does not administer justice but hands out favors or punishments, as the case may be, due to the espousal of erroneous doctrines, the *acceptatio personarum*, or political pressures.

In these cases of inconsistency, which tribunal is correct? What is the standard for examining these inconsistencies and resolving disagreements between tribunals? Obviously, the first standard for determining the justness in the manner of proceeding is the clear norm of procedural law itself. Moreover, when the manner of implementing a point of procedural law is unclear and when it is a question of the weight of certain proofs or of substantive law, all tribunals are bound to follow the consistent jurisprudence of the Church. In causes of nullity of marriage, as well as of the separation of spouses and other causes, this is principally the consistent, time-tested jurisprudence of the Roman Rota.⁷¹ The “particularity” of causes introduced and decided locally “cannot call into question the universal values of the Church. To be sure, ‘all sentences must be founded on the common principles and norms of justice.’ And this is precisely the competence proper and specific to the Rota as a Tribunal at the service of the Petrine ministry, that is, as an apostolic Tribunal at the service of the Pope in the exercise of his primacy.”⁷²

This is the reason why the decentralization of the third level of jurisdiction (i.e., regional or national third instance tribunals) was rightly rejected by the Latin Code Commission. Such a proposal was “not acceptable to the Consultors, since such a measure would empty the Apostolic tribunal that achieves a good of no small importance, namely, the uniformity of jurisprudence for the whole Church.”⁷³ As Gordon puts it, “the decentralization of third instance could not only diminish but even practically suppress

⁷¹ The jurisprudence of the CDF, insofar as it can be known, directs the judgment of penal causes involving a *gravius delictum*. The jurisprudence of the second section of the Apostolic Signatura does not direct the tribunals of the Church but rather indicates the correct observance of the law on the part of the public ecclesiastical administration. The latter tribunal, though, as dicastery of justice, also has the role of directing the use of a correct jurisprudence, which is largely a matter of the consistent and common jurisprudence of the Roman Rota, as will be discussed below (cf. Raymond L. BURKE, “La collaborazione tra Segnatura Apostolica e Rota Romana per la retta amministrazione della giustizia nella Chiesa, con particolare attenzione alla simulazione del consenso matrimoniale,” in *QSR*, 21 (2011), 17-30).

⁷² See Velasio DE PAOLIS, “La giurisprudenza del Tribunale della Rota Romana e i tribunali locali,” in *Per*, 98 (2009), 479 (= DE PAOLIS, “La giurisprudenza”), quoting Pope Benedict XVI’s 2008 discourse to the Tribunal of the Roman Rota.

⁷³ See *Comm*, 10 (1978), 243. In a contrary sense, see José Luis MÉNDEZ RAYÓN, “Normativa procesal y tercera instancia,” in *REDC*, 52 (1995), 622-624, 651-654.

the influence of the Sacred Roman Rota on giving unity to jurisprudence.”⁷⁴ All or most causes could be resolved within the nation in which the cause originates, since a first instance decision could be overturned by the second instance tribunal, but the regional or national third instance tribunal would usually issue a second conforming sentence, giving rise to a *res (quasi-) iudicata*. Apart from appeals made directly to the Roman Rota, that apostolic tribunal would assume jurisdiction over few causes, leaving it rare opportunities “by means of its sentences, [to] assist lower tribunals.”⁷⁵

Nevertheless, it can be feared that this situation is or will soon be coming about, on account of Pope Francis’ suppression of the requirement of a double conformity of sentences for definitively establishing the nullity of marriage (cf. new c. 1679). Now many causes of nullity of marriage are being resolved already in *first* instance. This gravely endangers the Church’s protection of the greater guarantee of truth previously provided for in the mandatory appeal by the defender of the bond established by Pope Benedict XIV in 1741 and its evolved expression in the obligation to transmit a cause decided *pro nullitate* to the appellate tribunal. The reformed norm has created a situation that resembles the one feared by Father Gordon, had third instance tribunals been instituted at the national or regional level. For as in that situation, much more in the present state of affairs, even fewer causes arrive at the Rota, leaving the Rota in a position of having “little influence ... in creating a certain common jurisprudence among ecclesiastical tribunals.” This is now becoming a situation in which local tribunals “will easily indulge in their own opinions.” There is thus a risk that “the unity of jurisprudence will perish” and be replaced by local diverse manners of proceeding, criteria for the evaluation of proofs, and the substantive jurisprudence concerning marriage. This situation may constitute “a most serious detriment to the faithful and the Christian family.” And Gordon described these consequences as “evils to be avoided.”⁷⁶

More recently, De Paolis spoke of the contemporary problem, existing even in the Church, of a “crisis of jurisprudence,” since one can detect “tendencies that have dominated local tribunals, even at a national level, which in so many cases have proceeded with independence in the interpretation and application of the law on points which touch the very foundations of matrimonial law.”⁷⁷ If it should happen that causes not reach the Roman

⁷⁴ See GORDON, “De nimia processuum matrimonialium duratione,” 731, no. 302.

⁷⁵ See *PB* art. 126, §1, taken together with BENEDICT XVI, mp *Quaerit semper*, 30 August 2011, in *AAS*, 103 (2011), 569-571.

⁷⁶ GORDON, “De nimia processuum matrimonialium duratione,” 732, nn. 303-304.

⁷⁷ See DE PAOLIS, “La giurisprudenza,” 281, no. 1.2.

Rota, that is, should the Roman Rota not be able to be helpful in influencing the jurisprudence of local tribunals in accord with its own consistent jurisprudence, “the system, extremely deferential to the tribunals of the particular Churches, leave the possibility completely open that particular jurisprudences will be formed without any control on the part of superior tribunals.”⁷⁸ At the same time, a most grave obligation binds the judicial and jurisprudential activity of the Roman Rota, which would betray its own venerable patrimony and its very apostolic and ecclesial purpose were it to simply ratify definitive sentences of diocesan or interdiocesan tribunals based upon an incorrect jurisprudence.

It is indeed just as important, if not more important than ever that all tribunals communicate clearly to parties their right to appeal to the Roman Rota a decision by which they are aggrieved. This is a right integral to the right of defense, as is emphasized throughout the Church’s sacred discipline.⁷⁹ The respect and exercise of this right will continue to generate jurisprudence, and it is hoped that it will be jurisprudence endowed with the same clarity, soundness, and authority for which the Roman Rota has become so renowned. “It cannot be imagined that a wrong interpretation and application of the law could be qualified with the noble name of jurisprudence.”⁸⁰

Whatever the case may be, ministers of justice can rest with confidence in their study of the volumes of Rotal decisions issued over the past century and beyond. For it remains ever more important for the judge to attain moral certitude about what is the authoritative jurisprudence governing a particular matter. And this jurisprudence comes about by “a multiplicity of equal cases which are decided with the same principles of law, in a common and consistent manner.”⁸¹ This is promoted by the Roman Rota in its decisions and in the Apostolic Signatura’s own vigilance over the use of a correct jurisprudence (cf. *LP* art. 111, §3). “The safeguarding of unity of jurisprudence is entrusted to the apostolic tribunals inasmuch as they are apostolic tribunals. It is not a question of uniformity but of unity on fundamental points and in

⁷⁸ See *ibid.*, 285, no. 1.2.

⁷⁹ Cf. JOHN PAUL II, discourse to the Tribunal of the Roman Rota, 26 January 1989, in AAS, 81 (1989), 925, no. 7; SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, decree, Prot. N. 21179/89 CP, 24 August 1989, in William L. DANIEL (ed.), *Ministerium Iustitiae. Jurisprudence of the Supreme Tribunal of the Apostolic Signatura. Official Latin with English Translation*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2011, 690; decree, Prot. N. 4419/1/96 SAT, 15 January 1996, in *ibid.*, 724; circular letter, Prot. N. 33840/02 VT, 14 November 2002, in *ibid.*, 751, no. 2; *DC* art. 257, §2; *Mitis Iudex*, preamble, no. VII, 960-961. The Rota’s own procedural jurisprudence also mentions this often.

⁸⁰ See DE PAOLIS, “La giurisprudenza,” 306-307.

⁸¹ See *ibid.*, 312-313.

essential matters, since it is accepted that unity can be demanded only in essential matters; and essential matters are safeguarded by the *munus petrinum* in the universal Church.”⁸²

The judge must decide according to a correct jurisprudence, and he must conduct trials according to the norm of procedural law. This demands, in view of the *pars statica*, that the necessary, duly appointed officials intervene in a cause, acting according to a proper deontology, that the judge only admit a cause over which the tribunal is truly competent, and that the authenticity of the whole process is ensured. In view of the *pars dinamica*, the judge is always to observe each step of the ordinary contentious process when it is to be used. At the same time, the reality of carrying out a trial, as was said, is always something in which many particular matters are determined by the nature of the cause, the character of the real participants, the quality of the proofs, and other such matters. For these reasons, even within the universal *ordo iudiciarius* of the Church, one detects many expressions of the flexibility of procedural norms.

In the constitution of the tribunal entrusted with a cause, there may be a question of whether the bishop is to judge a cause personally or through his tribunal (cc. 1419, §1; 1420, §2), and whether a single judge will employ assessors (c. 1424). There are moments when the legislator envisions exceptions to the law, which are subject to the judge’s discretion (e.g., cc. 1508, §2; 1554; 1558, §1; 1559; 1565, §2; 1609, §1). There are facultative judicial punishments (cc. 1457; 1470, §2), occasions when the judge may determine that a cause demands a rapid treatment (c. 1458), and when he can decree that an advocate is necessary (c. 1481, §1). At various moments in the process, the legislator leaves it to the judge to set time limits (c. 1465, §2; e.g., cc. 1516; 1552, §2; 1577, §3; 1601; 1603, §1; 1633 [extension]; 1655, §2).

Within the instruction of the cause, the judge determines which proofs must be admitted (cf. c. 1547, e.g., cc. 1550, §1; 1581; 1600, §1), sought *ex officio* (cf. c. 1452; e.g., cc. 1545; 1546, §2; 1582), or rejected (cf. cc. 1527, §2; 1553). He, or the auditor under his direction, stipulates the manner of stating questions (cc. 1564; 1577, §1) and collecting answers (cf. c. 1567). It is for him to decide whether an oath is to be administered in a cause of the private good (c. 1532), how to reimburse witnesses (c. 1571), and whether the instruction of the cause is sufficient (c. 1599, §2). He is able to discern whether there are most serious dangers demanding the non-publication of some act (c. 1598, §1). He decrees the manner of proceeding in incidental causes (cc. 1589-1590). Within the discussion of the cause, he decides whether there is to be an oral debate in place of the written one (c. 1602, §1; but see *DC* art. 240, §1) or in

⁸² See *ibid.*, 305-306.

addition to a written one (c. 1604, §2), and whether parties should be given an opportunity for a second response (c. 1603, §2).

At the time of the decision especially, it is for the judge to evaluate the proofs, since the legislator largely does not posit the value of proofs (cf. c. 1608, §3; e.g., cc. 1531, §2; 1536, §2; 1537; 1543; 1572-1573; 1579, §1; 1585). The judge may decide to defer the decision (c. 1609, §5), to extend the time for the writing of the sentence (c. 1610, §3), to permit the revelation of the dispositive part of the sentence prior to publication (c. 1614), or to retract or amend a null sentence issued by him (c. 1626, §2). The judge is competent, too, to suspend execution of a sentence upon receipt of a new proposition of a cause (c. 1644, §2), and to order the execution of a sentence when a dilatory *restitutio in integrum* has been requested (c. 1647, §2) or provisionally when there is an appeal (c. 1650, §2). Accordingly, while the norm of procedural law is marked with a necessary and secure formality, it also has an elastic character and thus enshrines the legislator's appreciation of the unforeseen eventualities that can arise in any trial, the resolution of which is left to the particular judgment of the judge.

4 — *The Universality of Vigilance over the Correct Administration of Justice (Administrative Activity)*

Executive or administrative power is the corollary to legislative power inasmuch as the legislative norm often needs to be explained or clarified in order for it to be correctly implemented, and it is constantly being applied to concrete cases, whether in a coercive manner or in a favorable manner. For these reasons, legislators in the Church, wherein there is not a separation but a distinction of powers, are also organs of public administration within the limits of their competence. The supreme legislator is also the supreme organ of public administration, such that he both legislates and provides for the correct implementation of law in the community that is the passive subject of his laws and with respect to individual physical and juridical persons in cases in which it applies to them.

As regards procedural law, the supreme legislator may issue or approve norms that complement the universal legislation, such as is observed in the *Ratio procedendi* attached to the *motu proprio Mitis Iudex* and in the Instruction *Dignitas connubii*. His ordinary governance over the administration of justice is carried out through and by the Supreme Tribunal of the Apostolic Signatura, whose "*sectio tertia*" constitutes a kind of dicastery or ministry of justice. It embodies the solicitude of the supreme pastor and legislator

over the respect and exercise of rights enjoyed by Christ's faithful, the just treatment of those summoned to appear before the Church's tribunals, and the dignity and sanctity of marriage and the family founded on marriage. It therefore exercises vigilance over the correct administration of justice in relation to all the tribunals of the Church, apart from the Roman Rota. It may entrust causes to the Roman Rota, grant favors related to the administration of justice, dispense from procedural laws, extend the competence of relatively incompetent tribunals, approve appellate and interdiocesan tribunals, correct ministers of justice and those who assist parties, and examine cases in which a party is seeking civil effects to be attributed to ecclesiastical sentences (cf. *LP* artt. 35, 106-121).

A key aspect of the Apostolic Signatura's vigilance is the positive promotion of the erection and proper functioning of ecclesiastical tribunals. When it is a matter of interdiocesan tribunals, the Signatura is in a unique position as the Supreme Pontiff's dicastery of justice. For it stands outside of and in administrative-hierarchical relation to the bishops and particular Churches involved. It has a more global view of the treatment of judicial causes in the region or nation in question, and it assists with the correct exercise of judicial power under the authority of the bishops, who became the judges of their dioceses in view of the papal appointment conferring upon them their office of diocesan bishop. Moreover, it exercises the Roman Pontiff's solicitude for the respect of the rights of all the faithful. In encouraging bishops to establish interdiocesan tribunals when this would be beneficial, "the Apostolic Signatura means in this way ... to facilitate the exercise of the right which the faithful have to be able to submit their causes to ecclesiastical tribunals, to decide their cause (cf. c. 221, §1)" as well as to "improve the functioning of tribunals, by way of cooperation of different dioceses and the availability of better prepared personnel."⁸³

The vigilance of the bishop as moderator of the tribunal is also of critical importance for the fullest realization of the Church's vision of the correct administration of justice and is always to be respected.⁸⁴ It is not the judicial vicar but he, the bishop, who has "the primary responsibility to be vigilant over his own tribunal."⁸⁵ He is the authority that exercises vigilance over the tribunal in a proximate and more frequent way (cf. *DC* art. 33). He does this

⁸³ See Velasio DE PAOLIS, "Amministrazione della giustizia e situazione dei tribunali ecclesiastici," in *REDC*, 64 (2007), 351-352, no. 2 (= DE PAOLIS, "Amministrazione della giustizia").

⁸⁴ Cf. *ibid.*, 349.

⁸⁵ See Frans DANEELS, "La vigilanza sui tribunali: introduzione al Titolo V della *Lex propria*," in Pier Antonio BONNET and Carlo GULLO (eds.), *La "Lex propria" del S.T. della Segnatura Apostolica*, Studi Giuridici 89, Vatican City, Libreria Editrice Vaticana, 2010, 203, no. 6 (= *La "Lex propria" del S.T. della Segnatura Apostolica*).

in the first place by erecting a tribunal, by ensuring that qualified individuals are prepared by means of the study of canon law to become ministers of justice, and by appointing them as ministers of justice. These measures are a basic and necessary part of the bishop's contribution to the appropriate duration of trials.⁸⁶ Additionally, he is to guarantee the correct exercise of their function, finding in the judicial vicar a close collaborator in this regard (*DC* art. 38, §3). The Apostolic Signatura looks upon him clearly as the principal agent of vigilance, being even somewhat deferential to him, for example, in the area of the disciplining of advocates and procurators.⁸⁷

Integral to this aspect of vigilance is the support of positive measures to sustain them in their role by affording them means and opportunities for continuing formation, especially in matrimonial and procedural law and in the jurisprudence of the Roman Rota (*DC* art. 35, §§1-2). "It is important that the Bishops be vigilant not only regarding the correct jurisprudence in their tribunals but also in the observance of the procedural norms which precisely guarantee the seriousness of the process and avoid useless complications and complaints."⁸⁸ The paternal involvement of the bishop in the good functioning of his tribunal is clearly of great importance. "Only by means of the involvement of particular Churches can abuses be uprooted and the organs of administration of justice be made to work."⁸⁹

At the same time, experience has proven that the bishop moderator's vigilance is not always adequate and that it often depends upon the complementary and higher vigilance of the Apostolic Signatura. For example, the Signatura may notice a frequent or even exclusive use of the ground of grave defect of discretion of judgment by a tribunal, and it will urge the tribunal to study and implement the 1987 and 1988 discourses of Pope St. John Paul II and the jurisprudence of the Roman Rota in the matter. In response, the bishop moderator may try to justify the practice due to various factors, such as the particular cultural context of the region, the lack of adequate marriage

⁸⁶ Cf. MAMBERTI, "Quam primum, salva iustitia," 192-195.

⁸⁷ Cf. *LP* art. 113, §1; G. Paolo MONTINI, "'In advocatos vel procuratores, si opus sit, animadvertere' (art. 124, 1° *Pastor bonus*). Un aspetto della vigilanza della Segnatura Apostolica sulla retta amministrazione della giustizia," in Jorge Ernesto VILLA AVILA and Celestino GNAZI (eds.), "*Matrimonium et ius*." *Studi in onore del Prof. Avv. Sebastiano Villeggiante*, Studi Giuridici 69, Vatican City, Libreria Editrice Vaticana, 2006, 40-42.

⁸⁸ Raymond Leo BURKE, "The Relation between the Apostolic Signatura and the Particular Churches," in *Jur*, 74 (2014), 27; IDEM, "Il Vescovo come moderatore del tribunale," in *IE*, 23 (2011), 30, no. 4.

⁸⁹ See Velasio DE PAOLIS, "Il giudizio secondo verità," in Juan Ignacio ARRIETA (ed.), *L'Is-truzione "Dignitas connubii" nella dinamica delle cause matrimoniali*, Studi 4, Venice, Marcianum Press, Istituto di Diritto Canonico San Pio X, 2006, 35.

preparation, or the prevalent secular mentality that does not understand the indissolubility and sanctity of marriage. In this way, the bishop moderator, too, reveals an imprecise understanding of the incapacity to consent. And so, reports a former secretary of the dicastery, the *Signatura* responds by observing “that insufficient preparation for marriage does not yet render a person incapable of giving valid matrimonial consent and that the current context of western civilization could involve the exclusion of marriage or of one of its properties or essential elements rather than the alleged grave defect of judgment.”⁹⁰ As another example, it will sometimes be necessary for the *Signatura* repeatedly to urge the bishop, who has requested dispensations from the academic degree requirement, to send candidates for judicial office to study canon law. Should the bishop neglect to do this, it may even deny his request until he demonstrates some commitment to preparing future canonists.⁹¹

Such aid is difficult for the *Signatura* to offer, however, when there are “bishops who do not respond to the requests of the Apostolic *Signatura* for information.”⁹² Indeed, “the efficacy of [the *Signatura*’s] interventions depends ... in large part on the real collaboration of the Moderators of tribunals, and on the true ecclesial spirit of their ministers, that is, on their [willingness] ‘*sentire cum Ecclesia*.’”⁹³ The supreme organ of vigilance over the correct administration of justice strives to share in and aid the bishop’s care for the souls of those affected by the activities of the tribunal. For it helps him address “the ‘pastoral solutions’ in declarations of matrimonial nullities” which are “contrary to the respect of substantive and procedural canonical norms” and which “are a true harm and a true injustice for souls.”⁹⁴ It does not strive to replace the bishop’s governance of his tribunal but “to recall the responsibility of the bishop in the administration of justice.”⁹⁵ It “addresses itself to bishop moderators in order to help them and encourage them in the exercise of this aspect of their pastoral ministry.”⁹⁶

⁹⁰ See Frans DANEELS, “La prassi della vigilanza sui tribunali in senso stretto,” in *La “Lex propria” del S.T. della Segnatura Apostolica*, 241-242, no. 2.3 (= DANEELS, “La prassi della vigilanza”). For a similar account, see DE PAOLIS, “Amministrazione della giustizia,” 354, no. 1.

⁹¹ Cf. DE PAOLIS, “Amministrazione della giustizia,” 366, no. 7.

⁹² See Joseph R. PUNDERSON, “Accertamento della verità ‘più accessibile e agile’: preparazione degli operatori e responsabilità del Vescovo. L’esperienza della Segnatura Apostolica,” in Luigi SABBARESE (ed.), *Sistema matrimoniale canonico “in synodo,”* Rome, Urbaniana University Press, 2015, 94 (= PUNDERSON, “Accertamento della verità ‘più accessibile e agile’”).

⁹³ See DANEELS, “La prassi della vigilanza,” 250.

⁹⁴ See DE PAOLIS, “Amministrazione della giustizia,” 353, no. 4.

⁹⁵ See Velasio DE PAOLIS, “La funzione di vigilanza della Segnatura sulla retta giurisprudenza,” in *La “Lex propria” del S.T. della Segnatura Apostolica*, 229.

⁹⁶ See PUNDERSON, “Accertamento della verità ‘più accessibile e agile,’” 90.

The universality of the *ordo iudiciarius* has the consequence of its norms being indispensable even by bishops. Even the diocesan bishop, vicar of Christ in his particular Church, cannot relax the binding force of universal procedural legislation (cf. c. 87, §1: *Episcopus dioecesanus non dispensare valet in legibus processualibus*).⁹⁷ For these norms “have been established for the defense of rights,”⁹⁸ which in themselves flow from the human nature common to all the faithful. The procedural laws in question are those pertaining not only to the *pars dinamica* of the process, but also the *pars statica*—that is, not only the particular steps of the trial but also the whole organization and regulation of the judiciary.⁹⁹ The right of the faithful to a just process is something that is not subject to dispensation, since it flows from the natural law: the right to be informed about the claim (citation, *litis contestatio*), the supporting proofs (publication of the acts) and arguments (discussion), and the binding decision (publication of the definitive sentence); and the rights to defend one’s right (*ius agendi, litis contestatio*), to present supporting proofs (instruction) and arguments (discussion), and to challenge the decision (appeal, complaint of nullity, etc.). Admittedly, there are ancillary norms whose non-observance may not impair the exercise of these rights, but even that is necessarily a technical matter of justice that is not subject to the free prudent discretion of the public administration. It is no accident that the supreme ministry or department of justice is also the Supreme Tribunal, whose officials are endowed with the particular technical knowledge and forensic experience necessary for examining detailed questions of procedural law. It is therefore fitting that dispensation from procedural laws is reserved to the Apostolic Signatura.

The role of the bishop moderator of the tribunal is principally that of making provision for the administration of justice in his particular Church by preparing suitable ministers of justice; the natural corollary to this is his

⁹⁷ Revealing some sympathy for the view that sees this norm as anachronistic is Paolo MONETA in his “La funzione giudiziaria nella dinamica della potestà di governo della Chiesa,” in *La giustizia nella Chiesa: fondamento divino e cultura processualistica moderna*, Studi Giuridici 45, Vatican City, Libreria Editrice Vaticana, 1997, 35.

⁹⁸ “Leges ad processus spectantes, cum ad iurium defensionem sint constitutae, et dispensatio ab iis bonum spirituale fidelium directe non respiciat, non sunt obiectum facultatis, de qua agitur in Decreto *Christus Dominus*, n. 8, b” (PAUL VI, mp *Episcoporum muneribus*, 15 June 1966, in AAS, 58 (1966), 469, no. IV).

⁹⁹ For an extensive treatment of the question, see G. Paolo MONTINI, “La prassi delle dispense da leggi processuali del Supremo Tribunale della Segnatura Apostolica (art. 124, n. 2, 2ª parte, Cost. Ap. *Pastor bonus*),” in *Per*, 94 (2005), 60-66. In sum, we read elsewhere: “La prassi della Segnatura ha interpretato tali leggi come processuali, in quanto inserite nel Libro VII del Codice, ed ha escluso la competenza del vescovo diocesano” (DE PAOLIS, “Amministrazione della giustizia,” 365, no. 2).

vigilance over the correct exercise of this ministry, not the creation of exceptions from the observance of the universal discipline of the Church. Therefore, not only may he not dispense from procedural norms, but he also may not make use of the practices of toleration and dissimulation, that is, by tacitly authorizing the non-observance of procedural laws habitually or in particular cases. At the same time, he is competent for many administrative aspects of the judicial activity of his tribunal. In the case of the metropolitan archbishop, it is he who, with the consent of the interested bishop(s), designates his tribunal's appellate tribunal, while it is only for the Apostolic Signatura to approve this act (c. 1438, 2°).¹⁰⁰ The bishop moderator of the tribunal appoints all ministers of justice (cf. cc. 470, 472) and decides whether to appoint an adjunct judicial vicar (c. 1420, §3), which is not an obligatory office. He makes determinations about whether to entrust a cause to a college of three or five judges (c. 1425, §2) and about the manner of assigning judges (c. 1425, §3). He decrees whether the intervention of the promoter of justice is necessary in a particular case (c. 1431, §1), decides whether to permit an extern judge to collect proofs in his territory (c. 1469, §2), attends to the possible admission of a civilly recognized guardian or curator (c. 1479), and decides whom to approve as advocate (c. 1483) and whom to suspend or remove from the function of advocate (c. 1488, §1).

Conclusion

Attempts to promote the decentralization of aspects of the administration of the justice has born some good fruits in the Church's sacred discipline. Above all, it has developed the Church's understanding of the universality of her *ordo iudiciarius*: there is necessarily a universal regulation of judicial activity; ministers of justice are to be faithful in their observance of the norm of procedural law and in their study and use of apostolic jurisprudence; and vigilance over the correct administration of justice necessarily takes place not only locally but also at the level of the central organ of ecclesiastical governance. Additionally, proposals in favor of decentralization have led to an appreciation for the value of some particular procedural legislation, expressions of prudent discretion on the part of the judge in carrying out the process, and the irreplaceable function of vigilance on the part of the bishop moderator of a tribunal.

¹⁰⁰ Similarly, a group of the interested bishops creates and moderates an interdiocesan tribunal of first (c. 1423, §1) or second instance (c. 1439), while the Apostolic Signatura approves these arrangements.

The discipline of procedural law and forensic activity must always find their foundation in this principle of the universality of the *ordo iudiciarius*. For most trials carried out within ecclesiastical tribunals are centered upon some object that is part of the common patrimony of the whole Church. When the alleged nullity of a marriage is being examined, the manner of proceeding and the eventual decision have implications not only for the parties to the marriage in question, but also for holy matrimony itself. For if one marriage is examined with great care, diligence and even reverence by the tribunal before which the cause is pending, the tribunal demonstrates—regardless of whether the right decision is *pro nullitate* or *pro vinculo*—that the Church indeed treasures and protects marriage. On the other hand, if one marriage is judicially examined in a way that lacks good order, authenticity, and justice and betrays a divorce-oriented mentality, or in a way that is cold, obstructionistic and contrary to the care of souls, the tribunal causes scandal by undermining holy matrimony and the sanctuary of the family founded on marriage or by refusing the ministry of justice to those who justly seek it.

Likewise, when an individual accusation of commission of a delict is handled in a way that protects the presumed innocence of the accused while also taking the accusation seriously, and when the tribunal punishes only those proven to be guilty and acquits those not proven to be guilty, the tribunal reveals that the Church both defends and cares for her children. On the other hand, when the tribunal's manner of proceeding offends the dignity of the accused or of the alleged victims, when it disturbs the peace of the community—whether by presuming guilt, or by ignoring delictual accusations or prematurely publicizing them, or by proceeding in exaggerated secrecy and opaqueness, or by examining allegations with a disordered or protracted manner of proceeding—the tribunal causes scandal by leading all into discouragement or even despair of ever receiving public justice in the life of this world.

Indeed, in each ecclesiastical trial, it is in a sense not one marriage, not one priest, not one injured member of the faithful that is on trial, but marriage itself, the holy priesthood itself, and the very dignity of the human person. The care with which the Supreme Tribunal of the Apostolic Signatura judges contentious-administrative causes—while striking some as being too technical or rigorous—stands as a model of this vision, since it examines an alleged violation of the law by a singular administrative act in a way that respects the sacred dignity of all ecclesiastical governance. If one inopportune act can be declared illegitimate without reference to the clear norm of law, the exercise of sacred power by the public ecclesiastical administration is placed in a most vulnerable position, which would naturally lead to

instability and disorder in the society of the Church's life on earth. Attentiveness and fidelity to the universality of the judicial order of the Church thus constitutes a great service to the Church and to souls, especially by minsters of justice. For in so doing, they can participate in the revelation to the whole world that the Church is the *speculum iustitiae*, thus paving the way for souls better to meet and enter more deeply into communion with Christ the Lord, the *Sol iustitiae*.

PASTORAL CONVERSION AND THE EXERCISE OF AUTHORITY IN THE CHURCH: AN EXAMINATION OF POPE FRANCIS’ CRITERIA FOR THE REFORM OF ECCLESIASTICAL STRUCTURES¹

CHAD J. GLENDINNING

SUMMARY— In view of Pope Francis’ call for a “pastoral conversion” of ecclesiastical structures in *Evangelii Gaudium*, 27, this study reflects on how this is being implemented with various ecclesiastical structures at the universal, supra-diocesan, and diocesan levels. Specifically, the study examines the renewal of ecclesiastical structures through the lens of three examples: the reform of the Roman Curia (at the universal level); the modifications introduced into the procedures for the declaration of marriage nullity by means of the *motu proprio Mitis Iudex* (the diocesan level); and the renewed impetus of the authority exercised by conferences of bishops (supra-diocesan or regional level).

RÉSUMÉ — Au vu de l’appel du pape François dans *Evangelii Gaudium*, 27, pour une “conversion pastorale” des structures ecclésiastiques, cette étude est une réflexion sur les moyens par lesquels cet appel est mis en œuvre dans ces structures aux niveaux universel, supra-diocésain et diocésain. Plus précisément, l’étude examine le renouveau de structures ecclésiastiques sous l’angle de trois exemples : la réforme de la Curie romaine (au niveau universel) ; les modifications apportées aux procédures pour la déclaration de nullité d’un mariage par le *motu proprio Mitis Iudex* (au niveau diocésain) ; et l’élan renouvelé de l’autorité exercée par les conférences épiscopales (au niveau supra-diocésain ou régional).

¹ This text was reformulated from a presentation given at 31st Annual Convention of the Canon Law Society of Nigeria, 20-23 November 2017, in Port Harcourt, Nigeria.

Introduction

Then said Jesus to the crowds and to his disciples, “The scribes and the Pharisees sit on Moses’ seat; so practice and observe whatever they tell you, but not what they do; for they preach, but do not practice (Matt 23:1-3).²

Pope Francis does not avoid directing criticism to those who hold positions of power and exercise authority—especially ecclesiastical authorities. In this, he is consistent with the example of our Lord, who likewise did not refrain from criticizing the Scribes and Pharisees, those who exercised authority and occupied positions of influence in his own time. Reflecting on the passage of St. Matthew’s Gospel, noted above, at the Angelus address on 5 November 2017, Pope Francis used the occasion of our Lord’s criticism of the Scribes and Pharisees to caution against the abuse of power in our own time.

Brothers and sisters, a frequent defect, in those that have authority, be it civil or ecclesiastical, is to exact from others things that, although just, they, however, don’t put into practice personally. They live a double life. Jesus says: “They bind heavy burdens, hard to bear, and lay them on men’s shoulders; but they themselves will not move them with their finger” (v. 4). This attitude is an evil exercise of authority, which instead should have its first force in fact from good example. Authority is born of good example, to help others to practice what is right and due, supporting them in trials that are met on the way of goodness. Authority is a help, however, if it’s badly exercised, it becomes oppressive, it doesn’t let a person grow and creates an atmosphere of mistrust and hostility, and also leads to corruption.³

Pope Francis’ remarks during this Angelus address are not uncharacteristic, but conform to a consistent criticism he levels against those in authority. In his Apostolic Exhortation *Evangelii Gaudium*, on the Joy of the Gospel, Pope Francis discussed the need for a “pastoral conversion” of ecclesiastical structures and the exercise of authority in the Church. This “pastoral conversion” is necessary to ensure that the Church’s pastoral activity remains “mission-orientated”—an impulse *ad extra* that provides orientation for the Church’s mission in the world. In *Evangelii Gaudium*, 27, he articulates this vision:

27. I dream of a “missionary option”, that is, a missionary impulse capable of transforming everything, so that the Church’s customs, ways of doing

² Translation taken from *The Holy Bible*, Revised Standard Version, Second Catholic Edition, San Francisco, Ignatius Press, 2006.

³ FRANCIS, Angelus address, 5 November 2017, English translation <https://zenit.org/articles/angelus-address-on-practicing-what-one-preaches/>

things, times and schedules, language and structures can be suitably channeled for the evangelization of today's world rather than for her self-preservation. The renewal of structures demanded by pastoral conversion can only be understood in this light: as part of an effort to make them more mission-oriented, to make ordinary pastoral activity on every level more inclusive and open, to inspire in pastoral workers a constant desire to go forth and in this way to elicit a positive response from all those whom Jesus summons to friendship with himself. [...]⁴

The dangers of "ecclesial introversion" can be found at all levels, in parochial, diocesan, and universal Church structures. To counter this tendency, Pope Francis has reflected on the role of the Church as a "field hospital," as well as a "mother and shepherdess," images to reinforce the Church's "nearness" and "proximity" to the faithful. In his 2013 interview with Fr. Antonio Spadaro, Pope Francis elaborated on these images of the Church, and the implications for the reform of ecclesiastical structures.

The church's ministers must be merciful, take responsibility for the people and accompany them like the good Samaritan, who washes, cleans and raises up his neighbor. This is pure Gospel. God is greater than sin. The structural and organizational reforms are secondary—that is, they come afterward. The first reform must be the attitude. The ministers of the Gospel must be people who can warm the hearts of the people, who walk through the dark night with them, who know how to dialogue and to descend themselves into their people's night, into the darkness, but without getting lost. The people of God want pastors, not clergy acting like bureaucrats or government officials. The bishops, particularly, must be able to support the movements of God among their people with patience, so that no one is left behind. But they must also be able to accompany the flock that has a flair for finding new paths.⁵

In *Evangelii Gaudium*, Pope Francis re-articulated this vision for the Church, which has become highly programmatic for the reforms he has subsequently introduced:

49. [...] I prefer a Church which is bruised, hurting and dirty because it has been out on the streets, rather than a Church which is unhealthy from being confined and from clinging to its own security. I do not want a Church concerned with being at the centre and which then ends by being caught up in a web of obsessions and procedures. If something should rightly disturb us and trouble our consciences, it is the fact that so many of our brothers

⁴ FRANCIS, Apostolic Exhortation on the Proclamation of the Gospel in Today's World *Evangelii Gaudium*, 24 November 2013, in AAS, 105 (2013), 1019-1137, English translation in *Origins*, 43 (2013-2014), 427.

⁵ "Pope Francis' Interview with Jesuit Magazines," in *Origins*, 43 (2013-2014), 300.

and sisters are living without the strength, light and consolation born of friendship with Jesus Christ, without a community of faith to support them, without meaning and a goal in life. More than by fear of going astray, my hope is that we will be moved by the fear of remaining shut up within structures which give us a false sense of security, within rules which make us harsh judges, within habits which make us feel safe, while at our door people are starving and Jesus does not tire of saying to us: "Give them something to eat" (*Mk* 6:37).⁶

This "mission-orientated" impulse, concerned primarily with the needs of the faithful, and only secondarily with the structural and organizational reforms of ecclesiastical institutions, has been instrumental nonetheless with reforms introduced during the present pontificate.

In view of Pope Francis' call for a "pastoral conversion" of ecclesiastical structures, it is opportune to reflect on how this has taken shape with various ecclesiastical structures at the universal, supra-diocesan, and diocesan levels. Specifically, it is possible to examine how Pope Francis is implementing the renewal of ecclesiastical structures demanded by "pastoral conversion," a conversion that is "mission-orientated" and concerned with the welfare of the Christian faithful. This will be accomplished through an examination of the following examples: (1) the reform of the Roman Curia (at the universal level); (2) the modifications introduced into the procedures for the declaration of marriage nullity by means of the *motu proprio Mitis Iudex* (the diocesan level); and (3) the renewed impetus of the authority exercised by conferences of bishops (supra-diocesan or regional level).

1 — *Criteria for the Reform of the Roman Curia*

At the Second Vatican Council, by means of its Decree on Pastoral Ministry of Bishops, *Christus Dominus*, the council fathers recognized the important ministry carried out by the Roman Curia and, at the same time, called for its reform.

9. In exercising his supreme, full and immediate authority over the universal Church the Roman Pontiff employs the departments of the Roman Curia, which act in his name and by his authority for the good of the churches and in the service of the sacred pastors. It is the earnest desire of the Fathers of the sacred Council that these departments, which have indeed rendered excellent service to the Roman Pontiff and to the pastors of the Church,

⁶ FRANCIS, *Evangelii Gaudium*, 49, in *Origins*, 43 (2013-2014), 430.

should be reorganized and modernized, should be more in keeping with different regions and rites, especially in regard to their number, their names, their competence, their procedures and methods of coordination. [...]⁷

Specifically, *Christus Dominus* called for greater diversity in those who serve in the various dicasteries of the Roman Curia, that is, that they be “more widely taken from various regions in the Church, insofar as it is possible.” Similarly, the Second Vatican Council called for some bishops, especially diocesan bishops, to be chosen as members of the dicasteries, since “they will be able to report more fully to the supreme pontiff the thinking, the desires, and the needs of the all the churches.” Finally, the fathers of the council encourage the dicasteries to listen more attentively to the laity, those who are “outstanding for their virtue, knowledge, and experience” (*CD*, n. 10).

Pope Paul VI set this reform in motion by means of his apostolic constitution *Regimini Ecclesiae universae* of 1967.⁸ Pope John Paul II likewise reformed the structural organization and operational apparatus of the Roman Curia by means of his apostolic constitution *Pastor Bonus*.⁹ Many changes have been subsequently introduced, and it is anticipated that Pope Francis will issue a new apostolic constitution, incorporating the changes he has already introduced along with recommendations of the Council of Cardinals that has been assembled to assist the Roman Pontiff in the reform of the Roman Curia.¹⁰

⁷ SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church *Christus Dominus*, 28 October 1965, in AAS, 58 (1966), 702-712, English translation in A. FLANNERY (gen. ed.), *Vatican II: The Conciliar and Post-Conciliar Documents*, vol. 1, new rev. ed., Northport, NY, Costello Pub. Co., 1996, 568.

⁸ PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae*, 15 August 1967, in AAS, 59 (1967), 885-928, English translation in *Canon Law Digest*, vol. 6, 324-357.

⁹ JOHN PAUL II, Apostolic Constitution *Pastor bonus*, 28 June 1988, in AAS, 80 (1988), 841-924, 1867; 87 (1995), 588, English translation in *Code of Canon Law: Latin-English Edition, New English translation*, Washington, Canon Law Society of America, 2012, 678-751.

¹⁰ Following the meeting of the Council of Cardinals, 18-20 February 2019, the *ad interim* director of the Holy See Press Office, Alessandro Gisotti, provided the following update: “The main activity of this meeting of the Council consisted of the updating and rereading of the draft of the new Apostolic Constitution, whose provisional title, as is known, is *Praedicate evangelium*. In particular, the stylistic revision and canonistic rereading of the text continued. The members of the Council of Cardinals indicated how to proceed with the consultation of the draft that the Holy Father, in the name of synodality, intends to promote. It was decided that the national Episcopal Conferences, the Synods of the Oriental Churches, the dicasteries of the Roman Curia, the Conferences of the major superiors and some Pontifical Universities will be consulted.
(<http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/02/20/190220e.html>).

At his annual Christmas greeting to the Roman Curia in 2016, Pope Francis identified, in explicit terms, the twelve criteria used in the reform of the Roman Curia.¹¹ An examination of these criteria will illustrate how Pope Francis' programmatic vision of a "pastoral conversion" of ecclesiastical structures finds expression in the reform of the Roman Curia. Some of the criteria overlap, and include qualities to be found in individuals working in the Roman Curia, as well as characteristics which should mark the work of the Roman Curia itself.

Pope Francis begins by identifying personal criteria, those qualities that members of the Roman Curia ought to exemplify: individual responsibility, pastoral concern, and missionary spirit.¹² Here, he draws on Pope Paul VI's caution that

the Roman Curia should not be a bureaucracy, as some wrongly judge it, pretentious and apathetic, merely legalistic and ritualistic, a training ground of cloaked ambition and veiled antagonism, as others would have it. Rather, it should be a true community of faith and charity, of prayer and of activity, of brothers and sons of the Pope, who carry out their duties respecting one another's competence and with a sense of collaboration, in order to serve him as he serves his brothers and sons of the universal Church and of the entire world.¹³

Pope Francis then turns his attention to the organizational efficiency of the Roman Curia, noting how it should be marked by organizational clarity, improved functioning, modernization, sobriety, and professionalism. There is nothing terribly innovative in this, since a similar list of criteria was provided by the Second Vatican Council. To achieve a more efficient and streamlined Curia, Pope Francis acknowledged, under the criteria of "sobriety," that a significant reorganization is underway:

This involves the combination or merging of Dicasteries based on their areas of competence; simplification within individual Dicasteries; the eventual suppression of offices no longer responding to contingent needs; the integration into Dicasteries or the reduction of Commissions, Academies,

¹¹ These annual Christmas addresses have become noteworthy and memorable occasions. In 2005, Pope Benedict XVI used this occasion to reflect on the hermeneutics of continuity and discontinuity, particularly helpful in the interpretation of the documents of the Second Vatican Council and the reform of the liturgy. Pope Francis likewise has used this occasion in 2014 to address various "curial diseases" that negatively impact the work of the Roman Curia. As well, in 2015, Pope Francis identified a "curial antibiotics," that is, a "*catalogue of needed virtues* for those who serve in the Curia."

¹² FRANCIS, Address to the Roman Curia, 22 December 2016, in AAS, 109 (2017), 34-49, English translation in *Origins*, 46 (2016-2017), 502-507.

¹³ PAUL VI, Address to the Roman Curia, 21 September 1963, in AAS, 55 (1963), 793-800, English translation in *Canon Law Digest*, vol. 6, 313-322.

Committees, etc., all in view of the essential sobriety needed for a proper and authentic witness.¹⁴

The three criteria that are perhaps most characteristic of Pope Francis include: subsidiarity, synodality, and catholicity. Subsidiarity involves “the reordering of areas of competence specific to the various Dicasteries, transferring them if necessary from one Dicastery to another, in order to achieve autonomy, coordination and subsidiarity in areas of competence and effective interaction in service.”¹⁵ As Pope Francis said, “a synodal Church is a listening Church.”¹⁶ Consequently, the criteria of synodality “must also be evident in the work of each Dicastery, with particular attention being given to the Congress and at least more frequent Ordinary Sessions. Each Dicastery must avoid the fragmentation caused by factors such as the multiplication of specialized sectors, which can tend to become self-referential.”¹⁷ Finally, under the criteria of “catholicity,” Pope Francis signals a need for a greater effort at internationalization and the inclusion of the lay faithful in the work of the various dicasteries of the Roman Curia:

Among the Officials, in addition to priests and consecrated persons, the catholicity of the Church must be reflected in the hiring of personnel from throughout the world, and of permanent deacons and lay faithful carefully selected on the basis of their unexceptionable spiritual and moral life and their professional competence. It is fitting to provide for the hiring of greater numbers of the lay faithful, especially in those Dicasteries where they can be more competent than clerics or consecrated persons. Also of great importance is an enhanced role for women and lay people in the life of the Church and their integration into roles of leadership in the Dicasteries, with particular attention to multiculturalism.¹⁸

These twelve criteria—Individual responsibility, pastoral concern, missionary spirit, organizational clarity, improved functioning, modernization, sobriety, subsidiarity, synodality, catholicity, professionalism, and gradualism—reflect a call for both personal and institutional conversion. By ensuring that these criteria characterize the administrative apparatuses of all levels of Church authority, the Church will be more effective in the task of evangelization, rather than merely preoccupied with her “self-preservation.”¹⁹

¹⁴ FRANCIS, Address to the Roman Curia, 22 December 2016, in *Origins*, 46 (2016-2017), 505.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, footnote 30; cf. Address for the Fiftieth Anniversary of the Establishment of the Synod of Bishops, 17 October 2015, in *Origins*, 45 (2015-2016), 381-384; Apostolic Exhortation *Evangelii Gaudium*, 171.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Evangelii Gaudium*, 27.

2 — *Mitis Iudex* and the Reform of Marriage Nullity Procedures

While it is evident that the Synods of Bishops of 2014 and 2015 provided the proximate context in which to situate the reforms introduced into the procedures for declarations of nullity, Pope Francis identifies eight fundamental criteria that guided the work of reform. The *Subsidium* of the Roman Rota organizes these eight criteria into four broad themes, which can be used to discuss the fundamental criteria that guided the reform. From this, we can see that the criteria identified in *Evangelii Gaudium*—a “mission-orientated” pastoral conversion of ecclesiastical structures—finds concrete expression in the reforms introduced by *Mitis Iudex*.²⁰

2.1 — The Centrality of the Bishop in the Service of Justice

Pastors must be at the service of members of the faithful in need of special pastoral care after the breakdown of their marriage, including those seeking a declaration of nullity. As the *Subsidium* notes, “the exercise of this pastoral service can no longer be totally delegated to offices of the Curia, but it demands as well *the personal involvement of the Bishop*.”²¹ This finds concrete expression in the reforms introduced by *Mitis Iudex* in two ways: (1) the bishop himself as judge; and (2) the sole judge under the responsibility of the bishop.

2.1.1 — *The Bishop Himself as Judge*

In emphasizing that the bishop himself may act as judge in the diocese entrusted to his care, Pope Francis is recalling the provision of c. 1419: “§1. In each diocese and for all cases not expressly excepted by law, the judge of first instance is the diocesan bishop, who can exercise judicial power personally or through others according to the following canons.”

Despite this, it was commonplace for diocesan bishops to exercise judicial power through others, namely the judicial vicar (c. 1420), along with judges appointed to serve at the tribunal (c. 1421). In fact, exercising judicial power personally was even discouraged by *Dignitas Connubii*.²² After recalling the

²⁰ FRANCIS, Apostolic letter *motu proprio Mitis Iudex Dominus Iesus*, 15 August, in AAS, 107 (2015), 958-970, English translation in *Origins*, 45 (2015-2016), 418-423.

²¹ APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidium for the application of the M.p. Mitis Iudex Dominus Iesus*, January, 2016, Vatican City, 2016, 9.

²² PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage *Dignitas Connubii*, 25 January 2005, Libreria editrice Vaticana, 2005.

provision of c. 1419, §1, *Dignitas Connubii* adds: “Nevertheless, it is expedient that, unless special causes demand it, he not do this personally”, that is, exercise judicial power (*DC*, art. 22, §2). Similarly, The Directory for the Pastoral Ministry of Bishops, *Apostolorum Successores*, 180, acknowledges that “the administration of canonical justice is a duty of grave responsibility that demands, first and foremost, a profound sense of justice, but also sufficient canonical expertise and experience”—an expertise that the diocesan bishop may not, in fact, possess, limiting his ability to personally exercise judicial power.²³

In place of personally exercising judicial power, the task of the diocesan bishop in tribunal matters has been largely administrative. *Dignitas Connubii* identifies a two-fold function in this regard:

- Art. 33 — In light of the seriousness and the difficulty of causes of the nullity of marriage, it is the responsibility of Bishops to see to it:
- 1° that suitable ministers of justice are prepared for their tribunals;
 - 2° that those selected for this ministry each fulfill their respective functions diligently and in accordance with the law.

In addition to these responsibilities, Pope Francis encourages the personal exercise of judicial power in the introduction to *Mitis Iudex*, as an implementation of the teaching of the Second Vatican Council, and as a sign of the “conversion of ecclesiastical structures.” He states the following in the introduction to *Mitis Iudex*:

III. — The bishop himself as judge. — In order that a teaching of the Second Vatican Council regarding a certain area of great importance finally be put into practice, it has been decided to declare openly that the bishop himself, in the church over which he has been appointed shepherd and head, is by that very fact the judge of those faithful entrusted to his care. It is thus hoped that the bishop himself, be it of a large or small diocese, stand as a sign of the conversion of ecclesiastical structures, and that he does not delegate completely the duty of deciding marriage cases to the offices of his curia. This is especially true in the streamlined process for handling cases of clear nullity being established in the present document.

Lumen Gentium, 27, affirms that bishops are “vicars and ambassadors of Christ” with proper, ordinary and immediate” power of governance over those entrusted to their care. “In virtue of this power,” *Lumen Gentium*, 27, adds, “bishops have the sacred right and the duty before the Lord to make laws for their subjects, to pass judgment on them and to

²³ CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Apostolorum Successores*, 22 February 2004, Ottawa, CCCB Publications, 2004.

moderate everything pertaining to the ordering of worship and the apostolate.”²⁴

The encouragement to personally exercise judicial power has not been without criticism. Roch Pagé, for instance, wonders whether bishops, particularly those requesting a simplified procedure for declarations of nullity, would have been less enthusiastic had they known that they would be called upon to personally exercise judicial power, being first judges of first instance in their dioceses.²⁵ Particularly in view of the new abbreviated procedure outlined in *Mitis Iudex*, William Daniel identifies three concerns about the diocesan bishop’s proximity to individual judicial causes:²⁶

1. Despite promoting the principle of proximity between the diocesan bishop and those entrusted to his care, the abbreviated process does little to promote it, since he will have no direct contact with the parties. The instruction of the case is to be entrusted to an instructor who meets with the spouses. This arrangement will only reinforce, he argues, the perception that the Church decides these personal matters “from an ivory tower.”²⁷
2. The task of judging cases is entrusted to the diocesan bishop personally. While he will rely on the counsel of others, such as the instructor and assessor, he will nevertheless need to examine the acts and weigh the arguments. Will bishops have a sufficient opportunity to do so, in light of the demands of their office?
3. The role of the defender of the bond may be compromised in light of the fact that he/she must directly challenge a decision of the diocesan bishop. The diocesan bishop is, in effect, the employer of the defender of the bond, which may make challenging his decision all the more difficult. As he says, “It would be socially natural, therefore, for the defender of the bond habitually to avoid appealing decisions he finds unfounded or dubious.”²⁸

²⁴ SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in AAS, 57 (1965), pp. 5-75, English translation in A. FLANNERY (gen. ed.), *Vatican II: The Conciliar and Post-Conciliar Documents*, vol. 1, new rev. ed., Northport, NY, Costello Pub. Co., 1996, 350-426.

²⁵ R. PAGÉ, “Questions Regarding the Motu Proprio *Mitis Iudex Dominus Iesus*,” in *The Jurist*, 75 (2015), 609.

²⁶ W.L. DANIEL, “The Abbreviated Matrimonial Process before the Bishop in Cases of ‘Manifest Nullity’ of Marriage,” in *The Jurist*, 75 (2015), 554-556.

²⁷ *Ibid.*, 555.

²⁸ *Ibid.*, 556.

Despite these legitimate concerns, *Mitis Iudex* does envision a more proactive role of the diocesan bishop in the administration of justice. Perhaps it would be helpful to recall the admonition to diocesan bishops in *Apostolorum Successores*, concerning their exercise of judicial power. The Directory, in n. 68, identifies four general criteria to be observed by diocesan bishops. The first encourages the peaceful resolution of differences:

- a) Without prejudicing the exercise of justice, the Bishop should encourage the faithful to *resolve* their differences *peacefully* and seek to be reconciled at the earliest opportunity, even after the canonical process has begun, thereby avoiding the prolonged animosity to which judicial processes often give rise.

This is merely a succinct summary of c. 1446, §2, which encourages judges “to assist the parties to collaborate in seeking an equitable solution to the controversy and indicate to them suitable means to this end by using reputable persons for mediation.” This also found expression in the old c. 1675, which indicated that, before accepting a case, “a judge is to use pastoral means to induce the spouses if possible to convalidate the marriage and restore conjugal living.” In light of *Mitis Iudex*, this is no longer required by the new c. 1675. Presently, the judge need only verify that the marriage has irreparably failed and that conjugal living cannot be restored.

The second general criteria identified by *Apostolorum Successores* concerns the observance of procedural norms:

- b) The Bishop should observe and require others to observe the *procedural norms* established for the exercise of judicial power, since he recognizes that these rules are no mere formality, still less an obstacle to be circumvented, but are a necessary means for establishing the facts and for administering justice.

It is precisely for this reason that a diocesan bishop, despite possessing broad discretion in the dispensation of universal and particular disciplinary norms, may not dispense from procedural laws (c. 87, §1).

The third general criteria of the Directory concerns penal matters, so we can pass over this without comment and, instead, highlight the final general criteria identified:

- d) Given that the diocesan tribunal exercises the Bishop’s own judicial power, the Bishop should be vigilant that it observes the principles of the proper administration of justice in the Church. In particular, taking account of the singular importance and pastoral impact of sentences concerning validity or nullity of marriage, he should devote great care to this area, in harmony with the instructions of the Holy See. Where necessary, the Bishop should do all that is required to prevent abuses, especially

those which suggest an attempt to introduce a divorce-like mentality in the Church. He will also fulfil whatever responsibilities he may have for interdiocesan tribunals.

There is a real danger, perhaps even more so than before, that a “laxism” may creep into judicial practices—a danger even Pope Francis acknowledged—especially if the diocesan bishop is not vigilant in ensuring the proper administration of justice. Now that a sentence will no longer be routinely examined by a tribunal of second instance, the diocesan bishop will need to do all that is required to prevent abuses. The prevention of such abuses, however, especially by those diocesan bishops unfamiliar with the requirements of procedural law, will remain an ongoing challenge.

2.1.2 — *The Sole Judge under the Responsibility of the Bishop*

Another way in which the centrality of the Bishop in the service of justice is emphasized is through the appointment of sole judges. The introduction of *Mitis Iudex* states:

II. — A sole judge under the responsibility of the bishop. — In the first instance, the responsibility of appointing a sole judge, who must be a cleric, is entrusted to the bishop, who in the pastoral exercise of his judicial power must guard against all laxism.

Under the 1983 Code, cases concerning the bond of marriage are reserved to a collegiate tribunal of three judges, in first (c. 1425, §1) and second instance (c. 1441). If this could not occur in first instance, the conference of bishops could permit the bishop, for as long as the impossibility continued, to entrust cases to a single clerical judge who was to employ an assessor and auditor where possible (c. 1425, §5).

Mitis Iudex also affirms that cases of nullity of marriage are reserved to a college of three judges. Whereas prior to *Mitis Iudex* only one layperson could be selected to form a collegiate tribunal, after obtaining the prior approval of the conference of bishops (c. 1421), the new c. 1673, §3 requires only one clerical judge to preside; all other judges may be laypersons. In light of c. 1421, §3, the prior approval of the conference of bishops is still required before bishops may appoint lay people as judges.²⁹

If a collegiate tribunal cannot be constituted, the bishop is to entrust cases to a sole clerical judge who, where possible, is to employ two assessors of upright life, experts in juridical or human sciences, approved by the bishop

²⁹ J.P. BEAL, “*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary,” in *The Jurist*, 75 (2015), 481.

for this task (c. 1673, §4). This simplifies c. 1425, §5, for marriage nullity cases, inasmuch as the diocesan bishop no longer needs the prior permission of the conference of bishops before appointing sole judges for marriage cases. Preferring that decisions not be made without consulting others, the new c. 1673, §4 encourages the use of two assessors, approved by the bishop for this task, during the decision-making stage. Unlike c. 1424 (and *DC*, art. 52), where this specific approval by the bishop is not identified, *Mitis Iudex* requires assessors to be approved for this function by the diocesan bishop or bishop moderator. As Beal observes,

This additional role for the diocesan bishop can be seen as another effort on the part of *Mitis Iudex* to emphasize the ‘hands-on’ role it expects the diocesan bishop to play in his own diocesan tribunal and to underscore the responsibility of the bishop to ensure that the introduction of streamlined procedures does not compromise the Church’s witness to the indissolubility of marriage.³⁰

In other words, it guards against the “laxism” Pope Francis wants to prevent through the personal exercise of judicial power of the diocesan bishop, particularly when sole judges are employed in marriage nullity cases.

2.2 — Synodality in the Pastoral Service of Rendering Justice

The second foundational pillar of the reform recognizes that bishops exercise ministry in sacramental communion with other members of the college of bishops. This is seen, most especially, in preference for the traditional metropolitan appellate structure, reflected in c. 1438. The introduction to *Mitis Iudex* states:

V. — Appeal to the metropolitan see. — It is necessary that the appeal process be restored to the metropolitan see, especially since that duty, insofar as the metropolitan see is the head of the ecclesiastical province, stands out through time as a stable and distinctive sign of synodality in the Church.

Despite the preference for the traditional metropolitan appellate structure in c. 1438 and by Pope Francis in the introduction to *Mitis Iudex*, other structures are possible in light of c. 1439, which permits conferences of bishops, with the prior approval of the Apostolic Signatura, to establish one or more tribunals of second instance. If such are already in existence, *Mitis Iudex* makes no change in this regard. However, with the reduction of cases needing to be processed at a second instance tribunal, there may be some desire to revert to metropolitan model, but this cannot be done unilaterally. As Beal notes, “Changes in appellate structure will require the agreement of

³⁰ BEAL, “*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary,” 483.

bishops involved, especially the metropolitan whose tribunal will not bear the burden of handling appeals from all the suffragans, a favourable vote of the episcopal conference and the approval of the Apostolic Signatura.”³¹ The right to withdraw from an interdiocesan tribunal, recalled in the *ratio procedendi*, art. 8, §2 refers to interdiocesan tribunals of first instance, established in accord with c. 1423, not interdiocesan second instance tribunals, established in accord with c. 1439.

Yet another way in which synodality is emphasized in *Mitis Iudex* is reference to the right to appeal to the Holy See. The introduction to *Mitis Iudex* states:

VII. — Appeal to the Apostolic See. — In accord with a revered and ancient right, it is still necessary to retain the appeal to the ordinary tribunal of the Holy See, namely the Roman Rota, so as to strengthen the bond between the See of Peter and the particular churches, with due care, however, to keep in check any abuse of the practice of this appeal, lest the salvation of souls should be jeopardized.

This, of course, is not new. This ancient prerogative is articulated in c. 1417: “By reason of the primacy of the Roman Pontiff, any member of the faithful is free to bring or introduce his own contentious or penal case to the Holy See for adjudication in any grade of a trial and at any state of the litigation.” This principle is reflected in the fact that legitimate appeals can be made to the Roman Rota in place of the ordinary appellate tribunal of the tribunal which issued the sentence (c. 1444, §1; cf. c. 1673, §6).

Finally, Pope Francis emphasizes the importance of synodality in the exercise of judicial power through calling attention to the role of conferences of bishops “to offer encouragement and assistance to individual bishops so that they may carry out the reform of the matrimonial process.” Specifically, the *ratio procedendi* foresees the creation of a *vademecum* for one diocese or several (implicating conferences of bishops) “to guarantee the organization and uniformity of procedure,” with particular attention to the carrying out of the prejudicial or pastoral investigation.³²

2.3 — More Simplified and Agile Procedures

Like the criteria utilized to reform the Roman Curia, Pope Francis wants to ensure that tribunals are marked by organizational efficiency and improved

³¹ BEAL, “*Mitis Iudex* Canons 1671-1682, 1688-1691: A Commentary,” 485-486.

³² APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidium for the application of the M.p. Mitis Iudex Dominus Iesus*, January, 2016, Vatican City, 2016, 10-11.

functioning. Although there are several simplifications introduced into the procedures for the declarations of nullity by means of *Mitis Iudex*, two are most noteworthy. The first concerns the elimination of the need for a double conforming sentence in favour of nullity. The introduction to *Mitis Iudex* states:

I. — A single executive sentence in favor of nullity is effective. — First of all, it seemed that a double conforming decision in favor of the nullity of a marriage was no longer necessary to enable the parties to enter into a new canonical marriage. Rather, moral certainty on the part of the first judge in accord with the norm of law is sufficient.

Pope Francis does not provide a reason for the elimination of the double conforming sentence, beyond stating that it “was no longer necessary.” This must be seen in light of the requests made by the Synods of Bishops, calling for a streamlining of the procedure and, specifically, the possible elimination of the need for a second conforming decision in favour of nullity.³³ If there is no appeal within the time limit foreseen by law (15 useful days from the notice of the publication of the sentence — c. 1630), the sentence becomes effective and the parties are free to marry (cc. 1679, 1682, §1).

The second significant way in which the procedures were simplified was through the introduction of the *processus brevior*, an abbreviated procedure that takes place before the diocesan bishop in cases where the nullity of marriage is manifest. The introduction to *Mitis Iudex* states:

IV. — Briefer process. — For indeed, in simplifying the ordinary process for handling marriage cases, a sort of briefer process was devised—besides the current documentary procedure—to be applied in those cases where the alleged nullity of marriage is supported by particularly clear arguments.

The diocesan bishop is exclusively competent to pronounce the sentence when the briefer process is used, but he is not responsible for the instruction of the case. As the Roman Rota points out, “it is not the Bishop who instructs the case, interrogating the parties and witnesses, but he intervenes as judge in those cases in which the nullity is evident. The veracity of the judgment is safeguarded because qualified personnel assist the Bishop, who, in the end,

³³ The final report of the extraordinary assembly of the Synod of Bishops, held 5-19 October 2014, states, in n. 48: “A great number of synod fathers emphasized the need to make the procedure in cases of nullity more accessible and less time-consuming. They proposed, among others, the dispensation of the requirement of second instance for confirming sentences; the possibility of establishing an administrative means under the jurisdiction of the diocesan bishop; and a simple process to be used in cases where nullity is clearly evident” (*Origins*, 44 [2014-2015], 401).

takes on the responsibility of the moral certitude of the sentence he is to pronounce.”³⁴

As Pope Francis identified in the introduction to *Mitis Iudex*, this new briefer process is distinct from the already existing simplified procedures—the documentary process—used for cases involving: the existence of a diriment impediment; defect of legitimate form; and lack of a valid mandate of a proxy. The documentary process can be used in these cases and provisions are made for the instruction of documentary cases in *Mitis Iudex* (cc. 1688-1690).

2.4 — The Procedures are to be Offered Free of Charge

There has been a great deal of attention paid to the possibility of eliminating or reducing tribunal fees in light of two *motu proprios*. On a juridical level, Pope Francis has not eliminated the requirement of the parties to pay or compensate judicial expenses. Similarly, by encouraging the reduction or elimination of tribunal fees, he places himself squarely in line with existing provisions which provide for the reduction of judicial expenses. So, what is new or compelling about this issue, and how does it represent a call for a “pastoral conversion” of ecclesiastical structures? To examine this issue, very briefly, it is necessary to review the existing provisions in the 1983 Code of Canon Law and *Dignitas Connubii*, followed by an examination of more recent statements made by the Synod of Bishops and Pope Francis.

The 1983 Code treats judicial expenses in just one canon, c. 1649. It is for the bishop who directs the tribunal to establish norms for, among other things, the requirement of the parties to pay or compensate judicial expenses. Not excluded from this, of course, is the total elimination of tribunal fees on the part of those approaching the tribunal. *Dignitas Connubii* dedicates an entire title to the issue of judicial expenses. It provides important considerations about the payment of judicial expenses or the total and partial exemption from them. While it reaffirms the parties’ obligation to pay the judicial expenses, this is done “according to their ability” (*DC*, art. 302). Similarly, “those who are completely unable to bear the judicial expenses have a right to obtain an exemption from them; those who can pay them in part, have the right to a reduction of the same expenses” (*DC*, art. 305). In light of this,

³⁴ APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidium for the application of the M.p. Mitis Iudex Dominus Iesus*, January, 2016, Vatican City, 2016, p. 10.

perhaps the most noteworthy provision in *Dignitas Connubii* related to this matter is found in its last article:

Art. 308 — The Bishop Moderator is to see that neither by the manner of acting of the ministers of the tribunal nor by excessive expenses are the faithful kept away from the ministry of the tribunal with grave harm to souls, whose salvation must always remain the supreme law in the Church.

It is precisely the fear that “excessive expenses” are keeping the faithful from the ministry of the tribunal that has led both the synod fathers and Pope Francis to request the reduction or elimination of tribunal fees. In the final *relatio* of the 2014 extraordinary general assembly of the Synod of Bishops, the synod fathers drew attention to the need to revise the marriage nullity procedures.³⁵ Among other things, the *relatio* noted: “A great number of synod fathers emphasized the need to make the procedure in cases of nullity more accessible and less time-consuming, and, if possible, at no expense” (n. 48).

In his allocution to the Roman Rota in January 2015, Pope Francis likewise drew attention to his desire for an elimination of fees, without providing any indication of how this was to occur:

In strongly encouraging every tribunal to incorporate these figures—to favour the real access of all the faithful to the Church’s justice—I would like to emphasize the fact that a substantial number of causes at the Roman Rota are represented gratuitously when those who, on account of the crippling economic conditions in which they find themselves, are not in a position to procure a lawyer. I would like to underline that the Sacraments are freely given; the Sacraments give us grace; a matrimonial process touches upon the Sacrament of marriage. How I would like all processes to be free!³⁶

Pope Francis returned to this objective, in the introduction to *Mitis Iudex*. He recognized the need to provide a just compensation of tribunal employees, an often forgotten aspect of this question. With the increased involvement of the laity in tribunal procedures, the diocese needs to ensure that it can provide a just wage and decent remuneration. As such, it may not be possible, depending on the financial situation of the diocese, to eliminate fees entirely. The *Subsidium* of the Roman Rota even suggests that a donation on behalf of the needs of the poor may be more amenable to the parties, in place of prescribed fee in exchange for services rendered:

It is left to the just sensitivity of pastors and those responsible for tribunals the possibility of asking the parties, with pastoral tact, to contribute with an

³⁵ SYNOD OF BISHOPS, *Relatio synodi*, 18 October 2014, in AAS, 106 (2014), 887-908, English translation in *Origins*, 44 (2014-2015), 393-403.

³⁶ FRANCIS, Allocution to the Roman Rota, 23 January 2015, in AAS, 107 (2015), 182-185, English translation in *Origins*, 44 (2014-2015), 595-596.

offering for the needs of the poor. The parties will certainly be generous, such that the fragrance of charity will reach the minds and hearts of the faithful in the Church.³⁷

In short, while imposing some fee for the services of the tribunal remains a possibility, such costs should never deter the faithful from approaching the ministry of the tribunal. The elimination or reduction of such fees, then, may serve as an effective illustration of the “pastoral conversion” of ecclesiastical structures.

3 — *Conferences of Bishops*

Conferences of Bishops have become a well-known and well-utilized collaborative structure since the Second Vatican Council. The conference of bishops is a permanent institution, even if it involves only periodical meetings of the full assembly of bishops. It has a permanent council (c. 457), a secretariat (c. 458), and it enjoys juridic personality by reason of the law itself (c. 449, §2). As c. 447 indicates, such a structure permits bishops of a country or of certain region to exercise together “certain pastoral offices for Christ’s faithful of their territory. By forms and means of apostolate, suitable to circumstances of time and place, it is to promote, in accordance with the law, that greater good which the Church offers to mankind.” More specifically, the Directory for the Pastoral Ministry of Bishops, *Apostolorum Successores*, identifies several important functions of conferences of bishops:

- i) the joint regulation of certain pastoral matters via *general decrees*, binding both the bishops and the faithful of the territory (cf. c. 455);
- ii) the *transmission of the doctrine* of the Church in a more incisive way and in harmony with the particular character of a nation and circumstances of life of its Christian faithful (cf. c. 753);
- ii) the coordination of individual efforts through *common initiatives* of national importance in apostolic and charitable fields. To this end, canon law has granted certain competences to episcopal conferences;
- iv) *a channel for dialogue with the political authority* common to the whole territory;
- v) the creation of valuable *common services*, which many dioceses are unable to provide alone.³⁸

³⁷ APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidium for the application of the M.p. Mitis Iudex Dominus Iesus*, January, 2016, Vatican City, 2016, 12.

³⁸ *Apostolorum Successores*, 28.

Conferences of Bishops also legitimately exercise the power of governance. Specifically, a conference of bishops may exercise legislative power in the form of general decrees, but only if: (1) it deals with a matter which, in universal law, is the competence of the conference; (2) the Apostolic See, on its own initiative (*motu proprio*), authorizes the conference to issue a decree; or (3) the Apostolic See grants this competence after it is requested by the conference of bishops (c. 455).

In his broader call for a “pastoral conversion” of ecclesiastical structures, Pope Francis has signaled a possibly enhanced role for conferences of bishops in *Evangelii Gaudium*:

The Second Vatican Council stated that, like the ancient patriarchal Churches, episcopal conferences are in a position “to contribute in many and fruitful ways to the concrete realization of the collegial spirit”. Yet this desire has not been fully realized, since a juridical status of episcopal conferences which would see them as subjects of specific attributions, including genuine doctrinal authority, has not yet been sufficiently elaborated. Excessive centralization, rather than proving helpful, complicates the Church’s life and her missionary outreach.³⁹

It is possible to identify three ways in which Pope Francis has empowered conferences of bishops, and encouraged a collegial approach to the exercise of episcopal ministry at national and regional levels.

3.1 — Involvement with Matrimonial Tribunals

The first example has already been examined in the context of the reforms introduced by *Mitis Iudex*. Pope Francis calls upon conferences of bishops to assist individual bishops in the reform of matrimonial processes, specifically in the organization of judicial power in the particular churches. The introduction to *Mitis Iudex* states:

VI. The duty proper to episcopal conferences. — Conferences of bishops, which above all should be driven by apostolic zeal to reach out to the dispersed faithful, should especially feel the duty of participating in the aforementioned “conversion” and they should respect the restored and defended right of organizing judicial power in their own particular churches.

The restoration of the proximity between the judge and the faithful will never reach its desired result unless episcopal conferences offer encouragement and assistance to individual bishops so that they may carry out the reform of the matrimonial process.

³⁹ *Evangelii Gaudium*, 32.

Pope Francis goes on, in *Mitis Iudex*, to identify a role for conferences of bishops in ensuring a just remuneration for tribunal employees, and that the processes remain free of charge:

Episcopal conferences, in close collaboration with judges, should ensure, to the best of their ability and with due regard for the just compensation of tribunal employees, that processes remain free of charge, and that the Church, showing herself a generous mother to the faithful, manifest, in a matter so intimately tied to the salvation of souls, the gratuitous love of Christ by which we have all been saved.

This is an interesting provision since the law itself does not envision a role for conferences of bishops in these matters (see *DC*, art. 308). Similarly, although not named explicitly, the *Ratio procedendi* encourages “one diocese, or several together, according to the present groupings” to produce a *vademecum*, to assist with the prejudicial process at the parochial level (art. 3). Evidently, “several” dioceses could collaborate at the level of the conference of bishops.

3.2 — References to Conferences of Bishops in Papal Documents

The second example of the esteem with which Pope Francis approaches conferences of bishops can be found in the footnotes of some of the principal documents of his pontificate. The encyclical *Laudato si'* makes reference to documents or statements issued by conferences of bishops from around the world nearly twenty times.⁴⁰ A similar trend can be found in the apostolic exhortation *Evangelii Gaudium*, where documents of various conferences of bishops are referenced sixteen times, and in *Amoris Laetitia*, ten times.⁴¹ While it is commonplace to see copious references to magisterial documents of the Roman Pontiff in documents of the conferences of bishops, Pope Francis' use of documents issued by a multitude of conferences of bishops is unique. It is an acknowledgement and validation, it seems, of the authentic teaching authority exercised by conferences of bishops, an often overlooked element of c. 753.

This practice is also an expression of “synodality,” a theme that is consistently raised by Pope Francis. Synodality, or “journeying together” involves a Church that listens. As Pope Francis has said, synodality involves

⁴⁰ FRANCIS, Encyclical letter on care for our common home *Laudato si'*, 24 May 2015, in *AAS*, 107 (2015), 847-945, English translation in *Origins*, 45 (2015), 113-151.

⁴¹ FRANCIS, Post-synodal apostolic exhortation on love and the family *Amoris Laetitia*, 19 March 2016, in *AAS*, 108 (2016), 311-446, English translation in *Origins*, 45 (2015-2016), 777-827.

“a mutual listening in which everyone has something to learn”—the Christian faithful, the college of bishops, the Bishop of Rome.⁴² In identifying the limits of the apostolic exhortation *Evangelii Gaudium*, Pope Francis spoke about the limits of his own authority.

Nor do I believe that the papal magisterium should be expected to offer a definitive or complete word on every question which affects the Church and the world. It is not advisable for the Pope to take the place of local Bishops in the discernment of every issue which arises in their territory. In this sense, I am conscious of the need to promote a sound “decentralization”.⁴³

It follows, then, that the teachings of conferences of bishops can find legitimate expression in, or serve as sources to, documents of the papal magisterium.

3.3 — *Magnum Principium* and the Translation of Liturgical Texts

The third and final example of Pope Francis’ empowerment of conferences of bishops can be found in the changes he introduced to c. 843, by means of the motu proprio *Magnum Principium*.⁴⁴ Although the textual changes are not numerous, the modifications signal an ecclesiological shift with important juridical consequences.

The Second Vatican Council envisioned that to some extent the conferences of bishops would be able to regulate the liturgy (SC, n. 22, §2).⁴⁵ The third paragraph of the revised canon 838 identifies the two principal competencies of conferences of bishops: (1) to *faithfully* prepare vernacular translations of the liturgical books (*fideliter* was added to emphasize the need to ensure fidelity to the Latin text); (2) to approve and publish the vernacular versions after receiving the *confirmatio* of the Holy See. The second paragraph of c. 838 identifies a third competency, namely, to approve *adaptations*, which nevertheless require the *recognitio* of the Apostolic See. Prior to *Magnum Principium*, vernacular translations prepared and approved by conferences of bishops likewise required the *recognitio* of the Apostolic See.

⁴² POPE FRANCIS, Address in Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops, 17 October 2015, in AAS, (2015), 1138-1144, English translation in *Origins*, 45 (2015-2016), 381-384.

⁴³ *Evangelii Gaudium*, 16.

⁴⁴ FRANCIS, Apostolic letter motu proprio by which can. 838 of the Code of Canon Law is modified *Magnum Principium*, 3 September 2017, in *Origins*, 47 (2017-2018), 313-314.

⁴⁵ SECOND VATICAN COUNCIL, Constitution on the Sacred Liturgy *Sacrosanctum Concilium*, 4 December 1963, in AAS, 56 (1964), 97-138, English translation in FLANNERY1, 1-36.

According to the revised c. 838, *adaptations* introduced and proposed by the conferences of bishops require the *recognitio* of the Apostolic See (§2), whereas vernacular *translations* require the *confirmatio* of the Apostolic See (§3). What is the difference between these two terms, and why was a modification to c. 838 necessary?

3.3.1 — The *Recognitio* of the Apostolic See

The *recognitio* of the Holy See is a legal review by which the Holy See considers the adaptation made, and sometimes requires changes, before the text can be published on the authority of the conference itself.⁴⁶ There are two kinds of adaptations that the conference of bishops may introduce: (1) adaptations specified in the law itself, for matters identified in the *Code of Canon Law* or the *praenotanda* of the liturgical books; and (2) more profound adaptations (*profundiores aptationes*), foreseen by *Sacrosanctum Concilium*, n. 40, and regulated by the 1994 instruction of the Congregation for Divine Worship and Discipline of the Sacraments, *Varietates Legitimae*.⁴⁷ Both kinds of adaptations need the subsequent *recognitio* of the Apostolic See.

Archbishop Arthur Roche, Secretary of the Congregation for Divine Worship and the Discipline of the Sacraments, explains the rationale for the *recognitio*:

The *recognitio*, mentioned in canon 838 §2, implies the process of recognising on the part of the Apostolic See legitimate liturgical adaptations, including those that are “more radical” (*Sacrosanctum concilium* 40), which the Episcopal Conferences can establish and approve for their territories within defined limits. In the encounter between liturgy and culture the Apostolic See is called to *recognoscere*, that is, to review and evaluate such adaptations in order to safeguard the substantial unity of the Roman Rite: the references for this material are *Sacrosanctum concilium* nn. 39-40; and its application, when indicated in the liturgical books and elsewhere, is regulated by the Instruction *Varietates legitimae*.⁴⁸

⁴⁶ For an overview of the procedure observed in the approval of vernacular liturgical texts, prior to *Magnum Principium*, see my study “The Preparation and Translation of Liturgical Texts: Juridical Perspectives,” in *Studies in Church Law*, 8 (2012), 31-85.

⁴⁷ CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Instruction on the Roman liturgy and inculturation *Varietates Legitimae*, 25 January 1994, in AAS, 87 (1995), 288-314.

⁴⁸ A. ROCHE, “A Key to Reading the *Motu Proprio Magnum Principium*,” in *Origins*, 47 (2017), 317.

As an explanatory note from the Pontifical Council for Legislative Texts indicates, the *recognitio* is required for validity.⁴⁹

3.3.2 — *The Confirmatio of the Apostolic See*

The *confirmatio* of the Apostolic See, now required for vernacular translations approved by conferences of bishops, must be distinguished from the *recognitio* discussed above. Inasmuch as the *confirmatio* “presupposes a positive evaluation of the fidelity and congruence of the texts produced,” it must not be considered as “an alternative intervention in the process of translation, but rather as an authoritative act by which the competent Dicastery ratifies the approval of the bishops.”⁵⁰ Similarly, the note accompanying the *motu proprio* states:

The *confirmatio* is an authoritative act by which the Congregation for Divine Worship and the Discipline of the Sacraments ratifies the approval of the Bishops, leaving the responsibility of translation, understood to be faithful, to the doctrinal and pastoral *munus* of the Conferences of Bishops. In brief, the *confirmatio*, ordinarily granted based on trust and confidence, supposes a positive evaluation of the faithfulness and congruence of the texts produced with respect to the typical Latin text, above all taking account of the texts of greatest importance (e.g. the sacramental formulae, which require the approval of the Holy Father, the Order of Mass, the Eucharistic Prayers and the Prayers of Ordination, which all require a detailed review).⁵¹

3.3.3 — *Clarification by Pope Francis*

In October 2017, Cardinal Robert Sarah, the Prefect of the Congregation for Divine Worship and the Discipline of the Sacraments, published a commentary on the significance of the *motu proprio* and the changes introduced

⁴⁹ “From the Code of Canon Law, as also from the Pastoral Directory for Bishops, it must be held that the *recognitio* is a *conditio iuris* that, by the will of the supreme Legislator, is required for validity. If the *recognitio* of the Apostolic See is not obtained, the decrees cannot be legitimately promulgated, and without the *recognitio*, they do not have binding force (can. 445)” (PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, Explanatory note on the legal nature and the extension of *recognitio* of the Holy See, 28 April 2006, in *Communicationes*, 38 [2006], 10-17, English translation in *Studies in Church Law*, 4 [2008], 38).

⁵⁰ A. ROCHE, “A Key to Reading the *Motu Proprio Magnum Principium*,” in *Origins*, 47 (2017), 317.

⁵¹ “Canon 838 in the Light of Conciliar and Postconciliar Sources,” in *Origins*, 47 (2017), 316.

to c. 838.⁵² The commentary attempted to address the novelty introduced by Pope Francis, namely the distinction between the *recognitio* and the *confirmatio* in the work of evaluating and approving vernacular translations of liturgical texts. To assist with distinguishing these two terms, Cardinal Sarah identified three circumstances when *confirmatio* is used in the 1983 Code of Canon Law.

- A. the case of an election which must be confirmed by a superior authority (cf. c. 147, 178, 179).
- B. the confirmation of the decrees of an Ecumenical Council by the Roman Pontiff before their promulgation (c. 341 §1).
- C. the decree of dismissal of a member of a religious institute, which cannot enter into force until after the confirmation of the Holy See or the diocesan bishop according to the nature—pontifical right or diocesan right—of the institute (c. 700).⁵³

What these examples share, he argued, is the fact that “there is an individual who acts according to his own authority, and a superior authority who must confirm his decision in order to evaluate and ensure its conformity to the law.” Applying this to the translation of liturgical books, Cardinal Sarah notes:

Consequently, if an Episcopal Conference has prepared and approved the translation of a liturgical book, it cannot publish it without having obtained beforehand the confirmation of the Apostolic See. In the above-mentioned cases which require the *confirmatio*, the superior authority is required to evaluate the conformity of the act to the law in force before confirming it; likewise, the Apostolic See must only grant the *confirmatio* after having duly examined whether the translation is “faithful” (“*fideliter*”), that is to say consistent with the text of the *editio typica* in Latin on the basis of the criteria set forth by the Instruction *Liturgiam authenticam* on liturgical translations.⁵⁴

In view of how *confirmatio* is used in parallel places in the Code, Cardinal Sarah’s conclusion is not unfounded. He continues by noting that, although *recognitio* and *confirmatio* are not “strictly synonymous,” there are nevertheless

⁵² The commentary appeared in French under the title, « Humble contribution pour une meilleure et juste compréhension du Motu Proprio Magnum Principium » in *L’Homme Nouveau*, no. 1648, 14 October 2017. It can be accessed here: <http://www.hommenouveau.fr/2306/humble-contribution-pour-une-meilleure-et-juste-comprehension-du-motu-proprio-magnum-principium.htm>. An unofficial English translation, utilized below, has been prepared Edward Pentin: <https://www.scribd.com/document/361279576/Cardinal-Robert-Sarah-s-Commentary-on-Magnum-Principium>

⁵³ Ibid.

⁵⁴ Ibid.

“interchangeable at the level of the responsibility of the Holy See.” In short, Cardinal Sarah confirmed that the Holy See remained the final arbiter on conformity of a vernacular translation to the Latin *editio typica*.

Pope Francis clarified his intention in revising c. 838 and explicitly rejected Cardinal Sarah’s argument that *recognitio* and *confirmatio* “are interchangeable at the level of the Holy See’s responsibility.”⁵⁵ While not clearly delineating these terms himself, Pope Francis provides some indication on how conferences of bishops are to approach the work of translation, particularly in light of the existing norms on translation found in *Liturgiam authenticam*.

Magnum Principium no longer holds that the translations must be in conformity on all points with the norms of *Liturgiam authenticam*, as was done in the past. [...]

In regard to the responsibility of Episcopal Conferences to translate “*fideliter*,” it is necessary to specify that the judgment on fidelity to the Latin, and the eventual necessary corrections, is carried out by the Dicastery, while today the norm grants the Episcopal Conferences the faculty to judge the goodness and the coherence of one and other terms in the translations of the original, when also in dialogue with the Holy See. [...]⁵⁶

According to Pope Francis, the *confirmatio* is granted “in a spirit of dialogue” and as an “aid to reflection.”

The *confirmatio* is certainly not a simply formal act, but necessary for the “translated” edition of the liturgical book: it is granted after the version has been submitted to the Apostolic See for the ratification of the approval of the Bishops, in a spirit of dialogue and of aid to reflection, if it is deemed necessary, and on respecting the rights and duties, on considering the lawfulness of the process followed and of its modalities.⁵⁷

In short, the changes introduced by means of *Magnum Principium* are not matters of legal semantics, a distinction between *recognitio* and *confirmatio*, but a realization of subsidiarity and synodality. Pope Francis aims, first and foremost, to ensure that the collaboration between the Holy See and conferences of bishops is fruitful—a true “journeying together.” As such, *confirmatio* has been adopted to highlight the fact that the act of preparing and

⁵⁵ Francis, Letter to Cardinal Sarah, 22 October 2017, <https://zenit.org/articles/liturgy-popes-letter-to-cardinal-sarah-unabridged-translation/>

⁵⁶ Ibid. Pope Francis continues: “Here one can add that, in the light of MP, the ‘*fideliter*’ of paragraph 3 of the canon, implies a threefold fidelity: to the original text *in primis*; to the particular language into which it is translated and finally to the intelligibility of the text for the recipients (Cf. *Institutio Generalis Missalis Romani* nn. 391-392).”

⁵⁷ Ibid.

approving vernacular translations is a responsibility that properly belongs to the “doctrinal and pastoral *munus*” of the conference of bishop, in light of the Second Vatican Council. Since *adaptations* to the liturgy do not, and fall under the vigilance exercised by the Apostolic See to order the sacred liturgy of the Universal Church, the *recognitio* of the Apostolic See is required before such adaptations can be duly and validly promulgated by the conferences of bishops.

The task of translating liturgical texts requires “a vigilant and creative collaboration full of reciprocal trust between the Episcopal Conferences and the Dicastery of the Apostolic See that exercises the task of promoting the Sacred Liturgy.”⁵⁸ The changes introduced by means of *Magnum principium* reflect many of Pope Francis’ criteria for reform we noted above—organizational clarity, synodality, and subsidiarity, to name just a few. The revised c. 838 is the result of a “pastoral conversion” of ecclesiastical structures, ensuring that the competencies assigned to conferences of bishops in *Sacro-sanctum Concilium* are given appropriate juridical expression.

Conclusion

Pope Francis’ *paradigmatic mission*—a “mission-orientated” impulse that provides orientation for the Church’s mission in the world necessarily gives rise to a *programmatic mission*, that is, a “pastoral conversion” of ecclesiastical structures. In the ecclesiastical structures we have examined—the Roman Curia, ecclesiastical marriage tribunals, and conferences of bishops, we see how this “pastoral conversion” aims to avoid “ecclesial introversion,” a Church that is primarily concerned with its self-preservation. As Pope Francis has noted in *Rio de Janeiro* on the occasion of the World Youth Day in 2013:

The “change of structures” (from obsolete ones to new ones) will not be the result of reviewing an organizational flow chart, which would lead to a static reorganization; rather it will result from the very dynamics of mission. What makes obsolete structures pass away, what leads to a change of heart in Christians, is precisely *missionary spirit*.⁵⁹

⁵⁸ Francis, Apostolic letter *motu proprio Magnum Principium*, 9 September 2017.

⁵⁹ FRANCIS, Address to the Leadership of the Episcopal Conferences of Latin America during the General Coordination Meeting, 28 July 2013, https://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-celam-rio.html

Pope Francis's vision of a church that is "mission-orientated" and concerned with the welfare of the Christian faithful is not without difficulties or ambiguities. Yet, it remains a bold and compelling vision that will require, inevitably, structural and institutional reforms. For such reforms to have any real and lasting impact, however, personal conversion on the part of the faithful is required. Pope Francis' criteria for reform of ecclesiastical structures is ultimately a call to adopt a new way of thinking, a *novus habitus mentis*,⁶⁰ "a missionary impulse capable of transforming everything, so that the Church's customs, ways of doing things, times and schedules, language and structures can be suitably channeled for the evangelization of today's world rather than for her self-preservation."⁶¹

⁶⁰ See, for instance, PAUL VI, Allocution to the Commission for the Revision of the Code of Canon Law, 20 November 1965, in *Communicationes*, 1 (1969), 38-42, English translation in *Canon Law Digest*, vol. 6, 141-145.

⁶¹ *Evangelii Gaudium*, 27.

VERITATIS GAUDIUM AND THE CANON LAW ON ECCLESIASTICAL UNIVERSITIES

JOHN M. HUELS

SUMMARY — The first part of this study briefly explains the notions of the ecclesiastical university and the ecclesiastical faculty, and it highlights the applicable universal laws governing them. The second part is a commentary on cc. 815-821 of the *Code of Canon Law* together with references to the counterpart canons of the *Code of Canons of the Eastern Churches* (CCEO cc. 646-650) as well as several recent juridical documents binding in both the Latin and Eastern Catholic Churches. Particular attention is given to the substantial differences between the canonical mission required of permanent professors at ecclesiastical universities and the *mandatum* of c. 812 required of Catholic professors who teach the theological disciplines in any institute of higher studies.

RÉSUMÉ — La première partie de cette étude explique brièvement les notions d'université ecclésiastique et de faculté ecclésiastique, et souligne les lois universelles qui les régissent. La deuxième partie est un commentaire des canons 815-821 du Code de droit canonique avec des références aux canons correspondants du Code des canons des Églises orientales (CCEO cc. 646-650) ainsi que de plusieurs documents juridiques récents ayant force obligatoire dans les Églises catholiques orientales et latine. Une attention particulière est accordée aux différences substantielles entre la mission canonique requise des professeurs permanents dans les universités ecclésiastiques et le *mandatum* du c. 812 requis des professeurs catholiques qui enseignent les disciplines théologiques en tout institut d'études supérieures.

Introduction

The first part of this study briefly explains the notions of the ecclesiastical university and the ecclesiastical faculty, and it highlights the applicable universal laws governing them. The second part is a commentary on cc. 815-821

of the *Code of Canon Law* together with references to the counterpart canons of the *Code of Canons of the Eastern Churches* (CCEO cc. 646-650) as well as several recent juridical documents binding in both the Latin and Eastern Catholic Churches.¹

1 — Revised Norms on Ecclesiastical Universities

In January 2018, the Vatican website posted new legislation by Pope Francis on ecclesiastical universities and faculties. Dated 8 December 2017, the Apostolic Constitution *Veritatis gaudium* (=VG) is now the principal source of universal legislation governing these universities and faculties.² This Constitution replaces its predecessor, the 1979 Apostolic Constitution *Sapientia christiana* (=SpC).³ Accompanying the text of *Veritatis gaudium* are Norms of Application, called *Ordinationes* in Latin (=Ord), published by the Congregation for Catholic Education (=CCE) for the implementation of the Constitution.⁴ These administrative norms replace those issued by the same Congregation in 1979.⁵ Both the new papal legislation and the administrative norms of the CCE bind all the Churches *sui iuris*, Latin and Eastern. To these must be added the 2018 Instruction

¹ This article is a revision of the chapter on ecclesiastical universities and faculties in John M. HUELS, *The Teaching Office of the Catholic Church: A Commentary on Book III of the Code of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 2017, 257-284.

² FRANCIS, Apostolic Constitution *Veritatis gaudium*, 8 December 2017, at www.vatican.va.

³ JOHN PAUL II, Apostolic Constitution *Sapientia christiana* on ecclesiastical universities and faculties, 15 April 1979, in AAS, 71 (1979), 469-499; English translation *Apostolic Constitution Sapientia christiana on Ecclesiastical Universities and Faculties*, Boston, St. Paul Editions, 1979.

⁴ CONGREGATION FOR CATHOLIC EDUCATION (CCE), Norms of Application (*Ordinationes*) for the implementation of the Apostolic Constitution *Veritatis gaudium*, 27 December 2107, at www.vatican.va. These administrative norms have the juridical value of general executory decrees (cc. 31-33).

⁵ S.C. for CATHOLIC EDUCATION, *Ordinationes*, 29 April 1979, in AAS, 71 (1979), 500-521; English translation *Norms of Application of the Sacred Congregation for Catholic Education for the Correct Implementation of the Apostolic Constitution Sapientia christiana*, Boston, St. Paul Editions, 1979.

See Francesco MARCHISANO, “La legislazione accademica ecclesiastica. Dalla Costituzione Apostolica *Deus scientiarum Dominus* alla Costituzione Apostolica *Sapientia christiana*,” in *Seminarium*, 20 (1980), 332-352, esp. 348-349; and Miguel SÁNCHEZ VEGA, “El régimen jurídico de las universidades eclesiales y la Constitución Apostólica *Sapientia christiana*, in *Apollinaris*, 53 (1980), 341-374.

of the CCE on the study of canon law in light of the reform of the matrimonial process.⁶

Veritatis gaudium tacitly abrogates *Sapientia christiana* by virtue of the integral reordering of its entire matter (c. 20, *CCEO* c. 1502 §1). In addition, it expressly revokes contrary laws and customs, both universal and particular, even if they are worthy of special or individual mention, as well as privileges granted by the Holy See to any person, physical or juridical, if they are contrary to the Constitution. It also revokes “anything whatsoever to the contrary notwithstanding, even if worthy of particular mention.”⁷ The 1979 *Ordinationes* are implicitly revoked by the abrogation of *Sapientia christiana* (c. 33 §2).

Ecclesiastical universities and faculties may be defined as “centers of higher studies of the sacred disciplines or related disciplines, erected by the Holy See or approved by it, having the faculty to grant academic degrees with canonical effects in the Church.”⁸ They are popularly known in English as “pontifical” universities, because key aspects of their existence are subject to the approval of the Apostolic See, including their establishment, the statutes, the appointment of the rector and deans, and the promotion of teachers to tenure and full professor. Prior to *Sapientia christiana*, ecclesiastical universities and faculties were at first governed by the Apostolic Constitution of Pius XI, *Deus scientiarum Dominus*,⁹ and the corresponding administrative

⁶ CCE, Instruction, The Study of Canon Law in Light of the Reform of the Matrimonial Process, 29 April 2018, at www.vatican.va. This Instruction has a series of administrative norms directed to the chancellor and other academic authorities of Catholic academic institutions in which canon law is taught. This audience indicates that these norms are the *instructiones* of c. 34, which “are given for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws” (c. 34 §1).

⁷ Art. 94. Vigentes in praesenti contra hanc Constitutionem leges vel consuetudines, sive universales sive particulares, etiam specialissima et individua mentione dignae, abrogantur. Item privilegia a Sancta Sede ad haec usque tempora personis sive physicis sive moralibus concessa, quae eiusdem Constitutionis praescriptis contraria sint, omnino abrogantur. Quae hac Constitutione apostolica decrevimus, iubemus omnibus in suis partibus serventur, contrariis quibusvis nihil obstantibus, etiam peculiari mentione dignis, et publici iuris fiant per editionem in Commentariis officialibus *Acta Apostolicae Sedis*.

On the effects of such a solemn revoking formula, see John M. HUELS, “General Revoking Formulas in Canon Law and Their Juridical Effects,” in *StC*, 46 (2012), 119-164.

⁸ Julio MANZANARES, “Las Universidades y Facultades eclesiásticas en la nueva codificación canónica,” in *Seminarium*, 35 (1983), 572-589, at 581.

⁹ PIUS XI, Apostolic Constitution *Deus scientiarum Dominus*, 24 May 1931, in *AAS*, 23 (1931), 241-262.

norms of the Sacred Congregation for Seminaries and Universities.¹⁰ These documents were integrally reordered in 1968 by norms issued by the S.C. for Catholic Education, which were approved *in forma specifica* by Pope Paul VI.¹¹

Canon law differentiates ecclesiastical universities and faculties from Catholic universities and other institutes of higher studies, the latter being governed by cc. 807-814 and the Apostolic Constitution *Ex corde Ecclesiae*.¹² The distinctive juridical trait of ecclesiastical universities is their canonical erection or approval by the Apostolic See and their consequent right to confer academic degrees by authority of the Holy See (*Ord* art. 1 §1). To be erected as an ecclesiastical *university*, the institution must have at least four faculties.¹³ A university as such may be ecclesiastical without all its faculties (or schools) being ecclesiastically erected.¹⁴ An ecclesiastical *faculty*, unlike a university, awards degrees in only one subject, but one institution may have more than one ecclesiastical faculty, for example, an institute with faculties of philosophy and theology. The disciplines for which an ecclesiastical faculty may be established are chiefly theology, canon law, and philosophy, which are the three disciplines regulated in *Veritatis gaudium* (arts. 68-84).

Veritatis gaudium is divided into two major parts. Part One, entitled “General Norms,” has separate sections treating the nature and purpose of ecclesiastical universities and faculties, the academic community and its government, teachers, students, officials and administrative and service personnel, plan of studies, academic degrees and other awards, didactic facilities, financial administration, and strategic planning. Part II, entitled “Special Norms,” has four sections devoted to the faculty of theology, the faculty of

¹⁰ S.C. FOR SEMINARIES AND UNIVERSITIES, *Ordinationes*, 12 June 1931, in AAS, 23 (1931), 263-284.

¹¹ S.C. FOR CATHOLIC EDUCATION, *Normae quaedam ad Const. apost. “Deus scientiarum Dominus,” de studiis academicis ecclesiasticis, recognoscendam*, 20 May 1968, Typis Polyglottis Vaticanis, 1968, 5-31; *EV* III, 106-151.

¹² JOHN PAUL II, Apostolic Constitution *Ex corde Ecclesiae* on Catholic universities, 15 August 1990, in AAS, 82 (1990), 1475-1509; *CLD*, vol. 12, 511-532.

¹³ *VG* art. 62 §2. See Ulrich RHODE, “Die Hochschulen,” in *Handbuch des katholischen Kirchenrechts*, 3rd ed., Regensburg, Verlag Friedrich Pustet, 2015, 1061.

¹⁴ For example, as a Catholic university, Saint Paul University in Ottawa is subject to *Ex corde Ecclesiae* (= *ECE*), except for matters pertaining to the ecclesiastical degree programs offered by the faculties of theology, canon law, and philosophy, which are regulated by *Veritatis gaudium* and cc. 815-820 (cf. *ECE* art. 1 §2). The university is also subject to its own statutes, which were approved by the Congregation for Catholic Education in 2009 (to be revised in 2019).

canon law, the faculty of philosophy, and other faculties. The sections on the faculties of canon law and philosophy incorporate modifications introduced by prior legislation in 2002¹⁵ and in 2011.¹⁶

2 — *Canons 815-821*

Canons 815-821 are situated in Title III, Chapter III of Book III of the Latin Code. Several of these canons have counterparts in the Eastern Code, as will be noted in the commentaries that follow. These seven canons treat the chief purpose of ecclesiastical universities and faculties (c. 815), their establishment and the approval of their statutes by the Apostolic See (c. 816), their capability to grant pontifical degrees (c. 817), the canons on Catholic universities that are applicable to them (c. 818), the obligation of diocesan bishops and religious superiors to send students to these institutions (c. 819), cooperation within them and with other universities and faculties (c. 820), and higher institutes of religious sciences (c. 821). The first six canons are enfolded by additional norms of *Veritatis gaudium* and the *Ordinationes*. Regarding the final canon, on institutes of higher studies, a 2008 Instruction of the Congregation for Catholic Education provides supporting norms which lend this canon greater intelligibility.

2.1 — Purposes

Canon 815. Ecclesiastical universities or faculties, which are to investigate the sacred disciplines or those connected to the sacred and to instruct students scientifically in the same disciplines, are proper to the Church by virtue of its function to announce the revealed truth.¹⁷

¹⁵ CCE, Decree *Novo Codice* on new norms concerning faculties of canon law, 2 September 2002, in AAS, 95 (2003), 281-285; English translation at www.vatican.va. The Decree replaced art. 76 of *Sapientia christiana* and arts. 56-57 of its norms of application (*Ordinationes*).

See Carlos ERRÁZURIZ, "Circa la conoscenza del diritto ecclesiale e il suo insegnamento universitario," in *Ius Ecclesiae*, 15 (2003), 562-573.

¹⁶ CCE, Decree *Ad operam intendens* on the reform of ecclesiastical studies of philosophy, 27 January 2011, in AAS, 104 (2012), 218-234; *Studies in Church Law*, 7 (2011), 29-46. The Decree replaces articles 72, 81, and 83 of *Sapientia christiana* and articles 51, 52, and 59-62 of the *Ordinationes*.

¹⁷ *Ecclesiae, vi muneris sui veritatem revelatam nuntiandi, propriae sunt universitates vel facultates ecclesiasticae ad disciplinas sacras vel cum sacris conexas pervestigandas, atque studentes in iisdem disciplinis scientificae instituendos.*

According to this canon, ecclesiastical universities and faculties “are proper to the Church by virtue of its function to announce the revealed truth.” This implies that the ultimate purpose of ecclesiastical universities and faculties is to participate in and foster the Church’s evangelizing mission. Concretely, this is done through the study of and instruction in the sacred disciplines and related sciences. The sacred disciplines include the theological disciplines and canon law. Related disciplines include philosophy, Church history, sacred music, and the human sciences. It is proper to the purpose and nature of the Church to establish and direct such universities or faculties, by virtue of its responsibility (*munus*) for announcing revealed truth.

Veritatis gaudium gives three broad purposes of ecclesiastical *faculties* which are applicable both to the ecclesiastical faculties within ecclesiastical universities and to faculties that are autonomous or part of institutes other than universities. The first purpose is the cultivation and promotion of the faculty’s discipline through scientific research. This has the goal of deepening knowledge of Christian revelation and doctrines connected with it, systematically enunciating the truths of doctrine, considering the recent progress of the sciences in the light of revelation, and presenting it in a manner adapted to various cultures (VG art. 3 §1). The second purpose is the academic and professional formation of students to a high level of qualification in accord with Catholic doctrine, as well as the continuing education of the Church’s ministers (VG art. 3 §2). The third purpose is to collaborate in close communion with the hierarchy and with the universal and local Churches in the work of evangelization (VG art. 3 §3).

The Eastern Code

The Eastern Code treats ecclesiastical universities and faculties in a section with five canons (cc. 646-650). It defines Catholic universities and faculties as those which have been canonically erected or approved by the competent ecclesiastical authority, which cultivate and teach the sacred sciences and related sciences, and which have the right to confer academic degrees that have canonical effects (c. 648). *CCEO* canon 647 restates two of the chief purposes of ecclesiastical universities and faculties. The first is to research and study topics related to divine revelation, including new questions arising today, and to communicate the results of this research in ways that are accommodated to one’s own culture. The second is to educate students in various disciplines according to Catholic teaching and prepare them for works of the apostolate, the ministry, or for teaching said disciplines as well to promote continuing formation.

2.2 — Establishment and Statutes

Canon 816 §1. Ecclesiastical universities and faculties can be established only through erection by the Apostolic See or with its approval; their higher direction also pertains to it.

§2. Individual ecclesiastical universities and faculties must have their own statutes and plan of studies approved by the Apostolic See.¹⁸

2.2.1 — *Establishment and higher direction*

§1. The first paragraph of the canon is an implicitly disqualifying law (c. 10). Ecclesiastical universities and faculties in the Latin Church can be validly established only (*tantum*) through their erection by the Apostolic See or by its approval. It is also a constitutive law, in that the establishment or approval by the Apostolic See is a constitutive element of being an ecclesiastical university or faculty. This special canonical status as an *ecclesiastical* university or faculty may come from the moment it is erected by the Apostolic See, or it may come after its erection, by the Apostolic See's subsequent approval of it as an ecclesiastical university or faculty. Thus, the essential element of attaining the status of "ecclesiastical" by a university or faculty in the Latin Church is its establishment or approval by decree of the Congregation for Catholic Education (CCE).¹⁹ Moreover, the Apostolic See is the highest authority of these institutions with respect to governance.

Any juridical person (diocese, religious institute, conference of bishops, etc), any level of secular government, or even a private physical person is capable of *establishing* a university or faculty. However, for it to be recognized as ecclesiastical, it must be *approved* by the Apostolic See and governed in accordance with canon law. Before erecting or approving an ecclesiastical university or faculty, the Congregation for

¹⁸ §1. Universitates et facultates ecclesiasticae constitui tantum possunt erectione ab Apostolica Sede facta aut approbatione ab eadem concessa; eidem competit etiam earundem superius moderamen.

§2. Singulae universitates et facultates ecclesiae sua habere debent statuta et studiorum rationem ab Apostolica Sede approbata.

¹⁹ PB 116 §2 states: "It [the CCE] erects or approves ecclesiastical universities and institutes, ratifies their statutes, exercises supreme supervision over them, and is vigilant so that the integrity of the Catholic faith is preserved in teaching doctrine." See JOHN PAUL II, Apostolic Constitution *Pastor bonus*, 28 June 1988, in AAS, 80 (1988), 841-930. See Alfonso POMPEI, "Natura e finalità specifiche delle Università e Facoltà ecclesiastiche," in *Seminarium*, 32 (1980), 412-433, esp. 419-425.

Catholic Education consults the local ordinary or eparch, the conference of bishops, and experts, especially those from neighbouring faculties (VG 62 §1).

2.2.2 — *Statutes and plan of studies*

§2. The second paragraph of this canon is also a constitutive law. Every ecclesiastical university or faculty must have its statutes and ecclesiastical degree programs approved by the Congregation for Catholic Education (PB 116 §2). Such a university or faculty may also offer civil degrees, subject to the applicable civil laws. The following elements must be addressed in the statutes of all ecclesiastical universities and faculties (*Ord*, Appendix I).

1. The name, nature and purpose of the university or faculty (with a brief history in the foreword).
2. The government—the chancellor, the personal and collegial academic authorities: what their exact functions are; how the personal authorities are chosen and how long their term of office is; how the collegial authorities or the members of the councils are chosen and how long their term is.
3. The teachers—what the minimum number of teachers is in each faculty; into which ranks the permanent and non-permanent are divided; what requisites they must have; how they are hired, appointed, promoted, and how they lose office (describing reasons needed and procedures); their duties and rights.
4. The students—requisites for enrollment and their duties and rights.
5. Officials and administrative and service personnel: their duties and rights.
6. Academic degrees: what degrees are given in each faculty and under what conditions; other qualifications granted.
7. Didactic and information facilities: the library, and how to provide for its maintenance and growth; other forms of didactic assistance and the scientific laboratories, if required.
8. Financial administration: the financial endowment of the university or faculty and its administration; norms for paying the leadership, teachers, administrative personnel; student fees; economic assistance for the students.
9. Relationships with other faculties and institutes, etc.

Plan of Studies

1. What the Plan of Studies is for each faculty.
2. What cycles there are.
3. What disciplines are taught: whether they are obligatory, and how often they are taught.
4. What seminars and practical exercises there are.
5. What examinations or equivalent tests there are.
6. Distance learning, where applicable.

The Eastern Code

In the Eastern Catholic Churches *sui iuris*, the authority competent to erect or approve an ecclesiastical university or faculty is either the Apostolic See or the higher administrative authority of the Church *sui iuris*—the patriarch, major archbishop, metropolitan, etc, together with (*una cum*) the Apostolic See (c. 649). Practically, this implies that an ecclesiastical faculty or university in the Eastern Churches may be established by the superior authority of the Church *sui iuris* but, for its degrees to be recognized throughout the Catholic Church, it must be approved by the Apostolic See.²⁰

According to *CCEO* canon 650, the *statutes* of ecclesiastical universities and faculties in the Eastern Churches *sui iuris* must conform to the norms given by the Apostolic See, chiefly in *Veritatis gaudium* and the accompanying *Ordinationes*. *CCEO* canon 650 mentions some matters which *especially* must conform to the norms of the Apostolic See, namely, “the governance, the administration, the appointment of teachers and their leaving office, the program of studies, and the conferral of academic degrees.” These matters make up a substantial part of both *Veritatis gaudium* and the *Ordinationes*.

2.3 — Ecclesiastical Degrees

Canon 817. No university or faculty which has not been erected or approved by the Apostolic See is able to confer academic degrees which have canonical effects in the Church.²¹

²⁰ For discussion of this point, see George NEDUNGATT, commentary in NEDUNGATT (ed.), *A Guide to the Eastern Code, A Commentary on the Code of Canons of the Eastern Churches*, Kanonika 10, Rome, Pontificio Istituto Orientale, 2002, 480–481.

²¹ *Gradus academicos, qui effectus canonicos in Ecclesia habeant, nulla universitas vel facultas conferre valet, quae non sit ab Apostolica Sede erecta vel approbata.*

The canon is a disqualifying law. No university or faculty which has not been erected or approved by the Apostolic See can validly confer academic degrees which have canonical effects in the Church. Stated positively, *only* universities or faculties established or approved as ecclesiastical by the Apostolic See can confer such degrees. The degrees correspond to the three cycles of study: the baccalaureate, the licentiate, and the doctorate. Special names can be added to these degrees in keeping with the diverse faculties (VG arts. 47, 48), for example, the bachelor degree in sacred theology (STB) or the licentiate and the doctorate in canon law (JCL, JCD). An ecclesiastical honorary doctorate may be awarded for special scientific merit or cultural accomplishment in promoting the ecclesiastical sciences (VG art. 51). This may only be done with the consent of the chancellor who, having heard the opinion of the university or the faculty, has obtained the nihil obstat of the Holy See (*Ord* art. 40). All ecclesiastical degrees are given by authority of the Holy See (*Ord* art. 35).

Although faculties that have not been erected as ecclesiastical may not confer ecclesiastical degrees, the Apostolic See may recognize some of their degrees as having canonical value.²² This enables the graduate to assume a position for which the ecclesiastical degree is required (*Ord* art. 8 §1). A licentiate or doctorate is a qualification for several positions in the Church. To teach philosophy, theology, or canon law in seminaries, the teacher must have a doctorate or licentiate from a university or faculty recognized by the Holy See (c. 253 §1). A doctorate is required to teach on an ecclesiastical faculty (VG art. 50 §1) and, from the context, it is clear that this doctorate is conferred by an ecclesiastical faculty (VG art. 46). To be a candidate for bishop, a priest must have a doctorate or at least a licentiate in sacred scripture, theology, or canon law from an institution of higher studies approved by the Apostolic See, or he must at least be truly expert in the same disciplines (c. 378 §1, 5°). Candidates for vicar general or episcopal vicar have the same requirement, except that the law does not explicitly mention that the degrees must come from an institution of higher studies approved by the Apostolic See (c. 478 §1). However, universities in many countries do not have the licentiate degree except at ecclesiastical universities. Canonically, the civil Master of Arts degree is not equivalent to the licentiate, even if awarded for a sacred science at a Catholic university.

²² VG, art. 9 §§2, 3; *Ord*, art. 7. See Heinrich MUSSINGHOFF and Herrmann KAHLER, commentary in Klaus LÜDICKE et al. (eds.), *Münsterischer Kommentar zum Codex Iuris Canonici*, Essen, Ludgerus Verlag, 1986-, vol. 3, 817/4, no. 9.

A doctorate or at least a licentiate in canon law is required to be appointed judicial vicar, adjutant judicial vicar, judge, promoter of justice, or defender of the bond (cc. 1420 §4, 1421 §3; 1435). Advocates in judicial cases must have a doctorate in canon law or be truly expert (c. 1483).

None of these degree requirements is a constitutive law (c. 86), so they are capable of dispensation by the competent authority. The diocesan bishop who is the moderator of the seminary may dispense from canon 253 §1; the Apostolic Signatura may dispense from the degree requirement for judicial officials (cf. c. 87 §1). Moreover, none of these canons is a disqualifying law (cf. c. 10), so appointment of a person lacking such a degree, even without a dispensation, would be illicit but not invalid.

The Eastern Code

In the law of the Eastern Catholic Churches, the right to confer academic degrees with canonical effects is part of the very definition of ecclesiastical universities and faculties (*CCEO* c. 648). A canonical degree is not required to teach in seminaries—just an “appropriate” degree (*CCEO* c. 340 §1). To be a candidate for bishop, protosyncellus, or syncellus, a priest must hold a doctorate or licentiate in some sacred science but, unlike the Latin Code with respect to candidates for bishop, the Eastern Code does not explicitly require that these degrees be awarded by an institution approved by the Apostolic See (*CCEO* cc. 180, 6°, 247 §2). The judicial vicar, adjutant judicial vicar, judge, promoter of justice, and defender of the bond must have a doctorate or at least a licentiate in canon law (*CCEO* cc. 1086 §4, 1087 §3, 1099 §2). An advocate must have a doctorate in canon law or otherwise be truly expert in it (*CCEO* c. 1141).

2.4 — Applicable Canons on Catholic Universities

Canon 818. The prescripts established for Catholic universities in canons 810, 812, and 813 are also valid for ecclesiastical universities and faculties.²³

This canon applies the norms of canons 810, 812, and 813 to ecclesiastical universities and faculties. The application of canons 813 and 810 is straightforward. Canon 813 makes the diocesan bishop responsible to ensure that there is pastoral care and spiritual assistance for students at universities, faculties, and other institutes of higher studies. Canon 810 says that professors in Catholic universities are to be appointed on the basis of academic

²³ Quae de universitatibus catholicis in cann. 810, 812 et 813 statuuntur praescripta, de universitatibus facultatibusque ecclesiasticis quoque valent.

qualifications, teaching ability, doctrinal integrity, and probity of life. These qualities also apply to professors at ecclesiastical universities and faculties.²⁴ In addition, *Veritatis gaudium* specifies three criteria for determining a permanent professor's academic qualifications: completion of a suitable doctorate or equivalent title or exceptional and singular scientific accomplishment; documentary proof of suitability for doing scientific research, especially by a published dissertation; and demonstrated teaching ability. The professor must also be "distinguished by wealth of knowledge, witness of life, and a sense of responsibility" (VG art. 25 §1, 1°).

The biggest debate on canon 818 prior to *Veritatis gaudium* had been whether this canon, by applying canon 812 to ecclesiastical universities and faculties, had abrogated the canonical mission of *Sapientia christiana*. Since canon 812 speaks only of the mandate and not the canonical mission, some authors said that the term "canonical mission" was abrogated and should no longer be used (cf. c. 20). Another view held that the canonical mission still exists as one species of the mandate. The latter argument was based in part on the *praxis Curiae Romanae*, which continued to speak of the canonical mission after the Code took effect.²⁵ Moreover, statutes of some ecclesiastical universities and faculties approved by the Congregation for Catholic Education after the Code took effect speak of the canonical mission.²⁶ The debate has been definitively resolved with *Veritatis gaudium*, art. 27, which repeats the same norm of *Sapientia christiana*.

§1. Those who teach disciplines concerning faith or morals must receive, after making their profession of faith, a canonical mission from the Chancellor or his delegate, for they do not teach on their own authority but by virtue of the mission they have received from the Church. The other teachers must receive permission to teach from the Chancellor or his delegate.

§2. All teachers, before they are given a permanent post or before they are promoted to the highest category of teacher, or else in both cases, as the

²⁴ See Miguel SANCHEZ VEGA, "El estado jurídico del profesor de la Universidad eclesiástica y la Constitución Apostólica *Sapientia christiana*, in *Apollinaris*, 53 (1980), 18-47.

²⁵ The CDF Instruction on the ecclesial vocation of theologians *Donum veritatis* states that "the collaboration between theologians and the magisterium takes place in a special way when a theologian receives a canonical mission or mandate to teach." Instruction *Donum veritatis*, 24 May 1990, in AAS, 82 (1990), 1550-1570, no. 22.

In the *Directory for the Pastoral Ministry of Bishops*, no mention is made of the "mandate." The chancellor or his delegate grants the *canonical mission* to professors at ecclesiastical universities and faculties. See CONGREGATION FOR BISHOPS, *Directory for the Pastoral Ministry of Bishops*, 22 February 2004, Libreria Editrice Vaticana, 2004, no. 136 (=DPMB).

²⁶ E.g., in the statutes of The Catholic University of America, "canonical mission" is used. In the statutes of Saint Paul University, *mandat* (French for "mandate") is used.

Statutes are to state, must receive a declaration of nihil obstat from the Holy See.

The ultimate purpose of the canonical mission is the same as the mandate. Each is a juridical affirmation attesting to the professor's commitment to maintain communion with the Church. This is explicitly acknowledged in the Apostolic Constitution. "Those who teach matters touching on faith and morals are to be conscious of their duty to carry out their work in full communion with the authentic Magisterium of the Church, above all, with that of the Roman Pontiff" (*VG* art. 26 §2). However, the canonical mission establishes a closer juridical connection between the professor and the Church than does the mandate. This special kind of mandate (the canonical mission) actually authorizes ("missions") them for their positions, without which they do not lawfully serve as professors under canon law. They do not teach on their own authority but by the authority of the Church, which has granted them the canonical mission.

The canonical mission is required of permanent professors who teach disciplines concerning *faith or morals*. The mandate of canon 812 applies to teachers of *theological disciplines*. In the Norms of Application of *Veritatis gaudium* (the *Ordinationes*), there is a taxative listing of the theological disciplines: Sacred Scripture; fundamental theology; dogmatic theology; moral and spiritual theology; pastoral theology; liturgy; Church history, patrology, archaeology; and canon law (*Ord* art. 55, 1b). Since canon 818 applies canon 812 to ecclesiastical universities and faculties, the meaning of "disciplines concerning faith and morals" in *Veritatis gaudium* acquires a concrete and precise meaning for ecclesiastical universities and faculties. They are the very theological disciplines listed in the *Ordinationes*.

The canonical mission is not the provision of an ecclesiastical office; it is not an appointment to the position of professor.²⁷ Professors who have a canonical mission, like those with the mandate, do *not* teach *nomine Ecclesiae*.²⁸ Both the canonical mission and mandate seek to ensure the catholicity of the professors' teaching and the maintenance of their full communion with the Catholic Church, but neither makes them agents of the Church. They enjoy academic freedom like other professors, although, as Catholics, they are obliged to respect Catholic doctrine and obey canon law, all the more since they are professors of Catholic theological disciplines.

²⁷ The provision of an ecclesiastical office can only be done by one of the means established in c. 147.

²⁸ See Jorge OTADUY, "El mandato de la autoridad eclesiástica para enseñar disciplinas teológicas," in *Folia Theológica et Canónica*, 3 (2014), 116.

Although, in virtue of canon 818, the canonical mission must be seen as a species of the mandate of canon 812, there are substantial differences between them.²⁹ The following points summarize these major differences.

1. *Nature.* The mandate is the juridical recognition by ecclesiastical authority that a professor is in the full communion of the Catholic Church and is committed to remaining in full communion throughout his or her career. The canonical mission is this and more; it is the ecclesiastical authorization for a permanent teaching position at an ecclesiastical university or faculty.
2. *Authority.* The competent authority to grant the mandate is the diocesan bishop. The competent authority to grant the canonical mission is the chancellor of the university, following the nihil obstat of the Apostolic See.³⁰
3. *Subjects obliged.* Those required to obtain the mandate are Catholic professors of Catholic theological disciplines at any institution of higher studies. Those required to obtain the canonical mission are the permanent professors of disciplines concerning faith or morals at ecclesiastical universities or faculties.
4. *Extent and duration.* The mandate is valid for any university in any location and is good for life, unless revoked. The canonical mission is valid only for a specified ecclesiastical university or faculty and lasts only as long as the professor holds an academic position there.

The Eastern Code

The Eastern Code has no comparable canon that applies certain canons on Catholic universities to ecclesiastical universities and faculties. Consequently, any obligations in the canons of the *CCEO* on Catholic universities oblige Eastern Catholic ecclesiastical universities and faculties only insofar as they are found in the canon law outside the Code, be it in *Veritatis gaudium*, the *Ordinationes*, or in particular law.

²⁹ Given these differences, a future revision of the Code on the subject might well treat them as distinct species, omitting this link between cc. 818 and 812.

³⁰ The chancellor is the ordinary ecclesiastical authority upon whom the university depends juridically. See Winfried AYMAN, *Kanonisches Recht: Lehrbuch aufgrund des Codex Iuris Canonici*, Paderborn, Ferdinand Schöningh, 2007, vol. 3, 148. See also Lino PIANO, "La prassi del 'nulla osta' della Santa Sede per i docenti di facoltà ecclesiastiche: lineamenti storici," in *Seminarium*, 35 (1995), 564-578.

2.5 — Obligation to Send Students

Canon 819. To the extent that the good of a diocese, a religious institute, or even the universal Church itself requires it, diocesan bishops or the competent superiors of the institutes must send to ecclesiastical universities or faculties young clerics or members who are outstanding in character, virtue, and talent.³¹

The canon, which has no counterpart in the *CCEO*, imposes a strong obligation on diocesan bishops and superiors of religious institutes. They must send (*debent mittere*) talented young clerics and religious to ecclesiastical universities and faculties to the extent that this may be required for the good of the diocese or the religious institute, or for the good of the whole Church. As noted above, ecclesiastical degrees are necessary for a number of positions in the Church, especially in dioceses, so it is incumbent on diocesan bishops to ensure that sufficient clerics are prepared academically for these positions.

The translations of canon 819 in some languages suggest that there are three categories of students being treated: young people, clerics, and members of religious institutes (*iuvenes, clericos, sodales*). However, none of the official sources for the canon pertain to the sending of lay students.³² Lay applicants to an ecclesiastical university could be required to have a letter of recommendation (*Ord*, art. 26 §1, 1°), but that is not a *missio*, even if it were to come from the diocesan bishop. They may attend these universities freely and have the right to do so (cf. c. 229 §2), but they cannot be sent against their will, since they have no special obligation of obedience to the bishop as do clerics. Accordingly, there are two categories of young people (*iuvenes*) in the canon, those who are clerics and those who are religious. In a future treatment of this issue in the universal law, the legislator might well widen the responsibility of the diocesan bishop also to *sponsor* (not “send”) willing lay persons to study the sacred sciences at these institutions, especially in dioceses that do not have sufficient suitable clerics available for advanced studies.³³ Moreover, given the relatively large proportion of students of more

³¹ Quatenus dioecesis aut instituti religiosi immo vel ipsius Ecclesiae universae bonum id requirat, debent Episcopi dioecesani aut institutorum Superiores competentes ad universitates vel facultates ecclesiasticas mittere iuvenes et clericos et sodales indole, virtute et ingenio praestantes.

³² In 2004, the Congregation for Bishops affirmed that the diocesan bishop’s obligation in this regard was to “send seminarians and young priests who are outstanding in character, virtue, and intelligence” to study at ecclesiastical universities, with no mention of lay students (*DPMB* 136). The translation of the canon is modified to convey its correct meaning. The CLSA translation speaks of sending “youth, clerics, and members” to ecclesiastical universities and faculties.

³³ The Second Vatican Council expressed the desire that more laity receive adequate theological formation and become professionally engaged in the theological disciplines (*GS* 62).

mature age who are attending ecclesiastical universities, it is not realistic to limit the scope of the canon to those who are young.

The 1917 Code *recommended* that local ordinaries send *clerics* for studies; this included seminarians who were tonsured or in minor orders. There was no obligation to send them, and religious superiors were not included in the canon (c. 1380). In canon 819, there is no mention of superiors of secular institutes and societies of apostolic life; they do not have this obligation to send students.

2.6 — Collaborative Efforts

Canon 821. The moderators and professors of ecclesiastical universities and faculties are to take care that the various faculties of the university offer mutual assistance as their subject matter allows and that there is mutual cooperation between their own university or faculty and other universities and faculties, even non-ecclesiastical ones, by which they work together for the greater advance of knowledge through common effort, meetings, coordinated scientific research, and other means.³⁴

The canon, with no equivalent in the Eastern Code, is an exhortation calling for cooperation within the university among the different faculties and also collaboration with other universities and faculties, including those that are not ecclesiastical, to promote the advance of knowledge by means such as joint programs, meetings, coordinated research projects, etc. The legislator assigns this responsibility to the principal administrators (*moderatores*) and the professors. The *moderatores* are those who participate in the governance of the university, including the chancellor, rector, vice-rectors, deans, council of administration, senate, faculty council, etc.

The universal law also addresses this subject in *Veritatis gaudium* and in the accompanying administrative norms (*Ordinationes*). Article 66 of the Apostolic Constitution states:

Cooperation between faculties, whether of the same university or of the same region or of a wider territorial area, is to be diligently striven for. In fact, such cooperation is of great help in promoting the scientific research of the teachers and a better formation of the students. It also fosters the

³⁴ Curent universitatum et facultatum ecclesiasticarum Moderatores ac professores ut variae universitatis facultates mutuam sibi, prout obiectum siverit, praestent operam, utque inter propriam universitatem vel facultatem et alias universitates et facultates, etiam non ecclesiasticas, mutua habeatur cooperatio, qua nempe eadem coniuncta opera, conventibus, investigationibus scientificis coordinatis aliisque mediis, ad maius Scientiarum incrementum conspirent.

advance of interdisciplinary collaboration, which appears to be ever more necessary, and it contributes to the development of complementarity among the various faculties. In general, it also helps to bring about the diffusion of Christian wisdom throughout all culture.

A norm of the *Ordinationes* likewise exhorts collaboration between ecclesiastical faculties and with other academic institutions. Article 52 §1 states: “Cooperation is to be fostered among the ecclesiastical faculties themselves by means of teacher exchanges, mutual communication of scientific work, and the promoting of common research for the benefit of the people of God.” The second paragraph urges the promotion of cooperation with non-ecclesiastical faculties, even of non-Catholics, “care always however being taken to preserve one’s own identity.” Both of these norms, as well as canon 820, are rooted in decrees of the Second Vatican Council (*GE* 12 and *GS* 62), which express the same values concerning collaborative efforts among academic institutions.

2.7 — Higher Institutes of Religious Sciences

Canon 821. The conference of bishops and the diocesan bishop are to make provision so that, where possible, higher institutes of the religious sciences are established, namely, those which teach the theological disciplines and other disciplines which pertain to Christian culture.³⁵

Canon 821, without a counterpart in the *CCEO*, is an exhortation directed to conferences of bishops and diocesan bishops. Where possible, they should provide for the establishment of higher institutes of the religious sciences in which are taught the theological disciplines and other disciplines that pertain to Christian culture. Higher institutes of the religious sciences are governed by special norms of the Congregation for Catholic Education in its 2008 Instruction *Con il concilio*, which is binding in both the Latin and the Eastern Churches *sui iuris*.³⁶ The higher institute of religious sciences is intended for the formation of the laity in theology and other religious disciplines, including canon law. The institutes do not offer a complete theological formation in preparation for priestly ordination but theological and ministerial courses geared to lay persons, lay religious, and perhaps permanent deacons. Besides the baccalaureate and

³⁵ Provideant Episcoporum conferentia atque Episcopus dioecesanus ut, ubi fieri possit, condantur instituta superiora scientiarum religiosarum, in quibus nempe edoceantur disciplinae theologicae aliaeque quae ad culturam christianam pertineant.

³⁶ CCE, Instruction *Con il concilio* on the reform of higher institutes of religious studies, 28 June 2008, in *Comm*, 40 (2008), 307-321; English translation at www.vatican.va (= *ConlC*). See Matteo VISIOLI, “L’Istruzione sugli Istituti Superiori di Scienze Religiose e lo studio teologico dei laici,” in *Quaderni di Diritto Ecclesiale*, 22 (2009), 360-384.

licentiate degrees (or the equivalent civil degrees), they may offer certificates or diplomas for non-degree seeking students (cf. *ConIC*, art. 18).

There are four common elements between ecclesiastical universities and faculties and many higher institutes of the religious sciences. (1) Each must be erected by decree of the Congregation for Catholic Education. (2) Higher institutes of the religious sciences may award the ecclesiastical baccalaureate and/or licentiate degrees (but not the doctorate). (3) Some higher institutes of the religious sciences are part of or juridically attached to an ecclesiastical faculty of theology. (4) Professors who teach the theological disciplines in a higher institute of the religious sciences must have a canonical mission.

Con il concilio, art. 3, identifies three *primary* goals of the course of studies in higher institutes of the religious sciences. Its first aim is the promotion of the religious formation of the laity and of those in consecrated life in order that they might better participate in the task of evangelization of the secular world in which they live. This role emphasizes also the assumption of professional duties in ecclesial life and in the installation of a Christian sensibility in society. Its second goal is to prepare candidates for the many diverse lay ministries and services to the Church. Its third goal is to prepare teachers of religion for all school levels below the university level.

The procedure for the canonical erection of a higher institute of the religious sciences comprises the second part of *Con il concilio* (arts. 38-43). The following steps must be observed. (1) The institute must take the initiative in requesting its canonical erection as a higher institute of the religious sciences. (2) The conference of bishops, or the competent assembly of hierarchs of an Eastern Church *sui iuris*, must assent. (3) The diocesan or eparchial bishop of the place where the institute is located must be involved in the formal arrangements, particularly the linkage between the institute and the respective faculty of theology. (4) The faculty of theology transmits to the chancellor the request for erection, along with a dossier which contains the following information:

- a) the positive opinion of the national conference of bishops or of another competent assembly of the Catholic hierarchy;
- b) the reasoned opinion of the faculty of theology regarding the affiliation of the higher institute of the religious sciences;
- c) the proposed agreement (convention);
- d) the statutes of the institute to be erected that conform with the norms of this Instruction;
- e) the plan of studies within each area and an indication of the credits to be assigned to each discipline;

- f) a list of the teachers with, for each one, their biographical data, their academic qualifications and degrees, their publications, their academic discipline, and their history of employment;³⁷
- g) a precise description of the location, of the library, of matters related to teaching, and of the financial administration;
- h) the number of students, whence they originate, and their state of life (religious or lay).

(5) The chancellor of the faculty of theology sends these materials to the Congregation for Catholic Education, along with his own opinion of the matter. (6) The Congregation for Catholic Education issues the decrees erecting the higher institute of religious studies and its attachment to a faculty of theology and the approval of its statutes *ad tempus et ad experimentum*.

Institutes of religious sciences may also be established for the formation of members of religious institutes and societies of apostolic life. These are founded by the Conference of Major Superiors of men or women or by a group of major superiors. If the institute is to have a program for the formation of candidates to the priesthood, its establishment and statutes must be approved by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.³⁸

The Eastern Code

Although the Eastern Code has no counterpart to Latin canon 821, the *CCEO* recognizes the existence of institutes of religious sciences in a canon on the lay faithful's right to study the sacred sciences. It says that lay persons "have the right to acquire a fuller understanding of the sacred sciences that are taught in ecclesiastical universities or faculties or in institutes of religious sciences by attending classes and pursuing academic degrees" (*CCEO* c. 404 §2).

Conclusion

CIC cc. 815-821 and *CCEO* cc. 646-650, which treat ecclesiastical universities and faculties, cannot be adequately understood and applied in

³⁷ There must be either five or four professors in higher institutes of religious sciences, depending on whether the institute has both the first and second cycle, or only the first cycle (*Ord*, art. 18 §2).

³⁸ CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Instruction on Inter-Institute Collaboration for Formation *Attenta alla condizioni*, 8 December 1998, in *EV*, vol. 17, 1339-1373; *CLD*, vol. 14, 591-623, nos. 21, 22a.

isolation of more recent juridical documents treating the same matters as do these canons but in much greater detail, with numerous additional norms on subjects not covered at all in the canons. These texts are chiefly the 8 December 2017 Apostolic Constitution of Pope Francis, *Veritatis gaudium*; the 27 December 2017 Norms of Application of *Veritatis gaudium*, also known as *Ordinationes*, issued by the Congregation for Catholic Education; and, with respect to canon 821 on higher institutes of the religious sciences, the 28 June 2008 CCE Instruction *Con il concilio* on the reform of higher institutes of religious studies. Together with the canons, these texts comprise the universal law (*ius universale*) of the Latin Church and the common law (*ius commune*) of the Eastern Catholic Churches *sui iuris* governing ecclesiastical universities and faculties.

THE FOUNDED HOPE THAT AN INFANT WILL BE BROUGHT UP IN THE CATHOLIC RELIGION AS A CONDITION FOR BAPTISM

TOMASZ JAKUBIAK

SUMMARY — In the everyday life of the Church community, the application of *CIC* c. 868 §1, 2° not infrequently contributes to tensions between the faithful and their pastors. The primary goal of this article is to explain how this canon is to be interpreted in light of a variety of human and family situations, including the adoption of children by homosexual couples and a growing number of couples living in irregular marriages. May the infants of such parents be baptized in light of the condition of the canon that there must be a founded hope that the child will be raised in the Catholic religion?

RÉSUMÉ — Dans la vie quotidienne de la communauté ecclésiale, l'application du canon 868 §1, 2° contribue souvent aux tensions entre les fidèles et leurs pasteurs. L'objectif principal de cet article est d'expliquer comment ce canon doit être interprété à la lumière de diverses situations humaines et familiales, notamment l'adoption d'enfants par des couples homosexuels et le nombre croissant de couples vivant dans des mariages irréguliers. Est-ce que les enfants de ces parents peuvent être baptisés compte tenu de la condition du canon selon laquelle il doit exister un espoir fondé que l'enfant sera élevé dans la religion catholique ?

Introduction

Holy Baptism is the basis of the whole Christian life, the gateway to life in the Spirit (*vitae spiritualis ianua*), and the door which gives access to the other sacraments. Through Baptism we are freed from sin and reborn as sons of God; we become members of Christ, are incorporated into the Church and made sharers in her mission....¹

¹ The article was translated by Małgorzata Wójcik CCC, no. 1213.

This is how the Catechism of the Catholic Church describes the effects of the sacrament of baptism, indicating that this sacrament is of fundamental importance for the entire Christian life. Therefore, it might seem that the church legislator would make it mandatory for all infants to be baptized or, at least, that no conditions would be imposed for the administration of the sacrament. However, this is not the case, as canon 868 §1, 2° *CIC* clearly articulates a condition which, if not satisfied, makes it necessary to delay an infant's baptism.² A decision to delay baptism is not an easy one, for both religious and formal reasons. Firstly, it entails responsibility for another person's salvation. Secondly, there are certain difficulties in the interpretation of the norm stipulated in canon 868 §1, 2° *CIC*.

The purpose of this article is to explain and discuss the condition which impacts the decision on whether to baptize an infant or to delay the baptism, that condition being the existence of a founded hope that the infant will be brought up in the Catholic faith. However, before we discuss this issue, it should be noted that, as regards the sacrament of baptism, in accordance with the legislator's decision expressed in canon 852 §2 *CIC*, an "infant" is a person who is not responsible for himself (*non est sui compos*). To understand the expression *non est sui compos*, reference should be made to canons 97 and 99 *CIC*. According to the norm stipulated in canon 97 §2 *CIC*, a minor before the completion of the seventh year is an infant and considered not responsible for himself (*censetur non sui compos*). With the completion of the seventh year, a minor is presumed to have the use of reason. Therefore, as far as baptism is concerned, a person who has completed the seventh year of age and has reached the use of reason must be treated as an adult (cf. c. 852 §1 *CIC*). Whoever habitually lacks the use of reason, despite having completed the seventh year, is considered not responsible for himself (*censetur non sui compos*) and is equated with an infant (c. 99 *CIC*).³

It should also be noted that, in many official translations of documents published by the Holy See in English concerning the administration of the sacrament of baptism to infants, the "infant" (*infans*) is substituted with the word "child." Consequently, the meaning of the word "child" as used in this text is equivalent to the legal definition of the term "infant," unless the context requires otherwise.

² Pope Francis amended c. 868 *CIC*, as will be discussed below. Cf. FRANCISCUS, Apostolic Letter *motu proprio De concordia inter Codices*, 31 May 2016, in AAS, 108 (2016), 602-606.

³ For more on the distinction between an infant and an adult, see T. JAKUBIAK, *Problem ważności przyjęcia sakramentu święceń w prawie Kościoła katolickiego*, Płock, Płocki Instytut Wydawniczy, 2018, 223-255; idem, "Intencja przyjęcia chrztu u dorosłego," in *Annales Canonici*, 9 (2013), 95-103.

1 — *Consent*

The existence of a founded hope that an infant will be brought up, or educated (*educatum iri*), in the Catholic faith is related to the requirement that the minister obtain the consent for the infant's baptism either from the parents or from their legal representatives. By giving consent, the parent or guardian agrees that the infant to be baptized will be brought up in the Catholic faith.⁴ Apart from danger of death, an infant may not licitly be baptized without this consent of the parents or their representatives.

When the infant is not in danger of death, the pastor administers baptism to the infant with the consent (not necessarily at the request)⁵ of *at least one* of the parents or their legal representatives (cf. c. 868 §1, 1° *CIC*).⁶ The sacrament is never administered without the actual knowledge of the parents or legal guardians or against their will.⁷ In practical terms, this means baptism may be administered at the request of a person other than the parents or guardians, so long as there is no explicit objection by the parents or legal guardians. In such a case, it is advisable that the person requesting the baptism present a letter to attest to the fact that neither parent raises any objection to the baptism, and this document should be retained in the parish archive; a copy may be issued to the person requesting the baptism. As noted by Pastuszko, the parents' consent may be expressed orally or in writing, as long as it is given. It is not necessary that the consent be given explicitly, but it is sufficient that it may be known implicitly (*implicite*).⁸ Such implied consent may be inferred from the lack of the parents' explicit objection to their child being baptized at the request of another person.

⁴ Cf. P. MONNI, "De batismo," in P.V. Pinto (ed.), *Studium Romanae Rote. Corpus Iuris Canonici. I. Commento al Codice di Diritto Canonico*, Libreria Editrice Vaticana, 2001, 540.

⁵ Cf. R. SZTYCHMILER, "Obowiązki rodziców w zakresie zapewnienia i przygotowania chrztu dzieci," in A.J. NOWAK (ed.), *Chrzest — nowość życia*, Lublin, Towarzystwo Naukowe KUL, 1992, 177.

⁶ Cf. S.M. VERBEEK, "Canons 868 §1, 1° and 391: Particular Law Requiring the Consent of Both Parties to Baptize Minor Children," in *RR 2009*, 85-87; P.M. DUGAN, "Canon 868: Baptism of Infant Child of Separated Parents," in *RR 2004*, 145-147; B.P. DALY, "Canon 868: Baptism of Child of Separated Parents," in *RR 2002*, 104-106.

⁷ Cf. KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), "Instrukcja duszpasterska Episkopatu o udzielaniu sakramentu chrztu świętego dzieciom," no. 2a, 14-15 December 1977, in *Wiadomości Archidiecezjalne Warszawskie*, 67 (1978), no. 1-2, p. 15.

⁸ Cf. M. PASTUSZKO, *Prawo o sakramentach świętych. Normy ogólne i sakrament chrztu*, vol. 1, Warszawa, Akademia Teologii Katolickiej, 1983, 148.

Clearly, such a situation requires a thorough analysis by the pastor who chooses to admit an infant to baptism, perhaps even in consultation with the local ordinary. When the parents or guardians (or one parent or guardian) give(s) indirect consent to the baptism of their infant, the pastor should carefully consider whether the person guaranteeing the child's Catholic upbringing will be able to fulfill the obligations imposed on them in view of the infant's baptism. It is advisable that those who give indirect consent be aware of how the guarantor intends to ensure the child's Catholic upbringing.

As regards the baptism of infants in danger of death, canon 868 §2 *CIC* stipulates: "An infant of Catholic parents or even of non-Catholic parents is baptized licitly in danger of death even against the will of the parents."⁹ Pursuant to canon 867 §2 *CIC*, such an infant should be baptized immediately, in view of his or her spiritual benefit. Even though the legislator stipulates that an infant may be licitly baptized contrary to his parents' explicit will, it does not—according to Hart—make such act mandatory.¹⁰ Thus, some dioceses suggest that, if the parents object to their infant being baptized in danger of death, then baptism should not be administered until particular extenuating circumstances arise.¹¹

2 — *Founded Hope of Catholic Upbringing*

When the infant is not in danger of death, for baptism to be administered licitly, aside from the consent of the parents or legal guardians, it is required that there be a founded hope that the infant will be brought up Catholic (cf. c. 868 §1, 2° *CIC*). A founded hope (*spes fundata*) is not the same as certainty. For such hope to be "founded," it must be based on reasonable premises.¹² The lack of any grounds for assuming that such hope exists means that it is altogether lacking and baptism should be delayed, according to the prescripts of particular law. The parents should be advised about the reason for such delay.

⁹ Cf. B.W. ZUBERT, "Chrzest dziecka wbrew woli rodziców," in *Prawo Kanoniczne*, 39 (1996), nos. 3-4, pp. 43-64.

¹⁰ Cf. K.T. HART, "Baptism," in *CLSA Comm1*, 1057.

¹¹ Cf. W.H. WOESTMAN, *Sacraments: Initiation, Penance, Anointing of the Sick. Commentary on Canons 840-1007*, Bangalore, Theological Publications in India, 2001, 64 [= WOESTMAN, *Sacraments: Initiation*].

¹² Cf. M. PASTUSZKO, *Prawo o sakramentach*, 148.

The condition of Catholic upbringing results from the Church's concern for ensuring that the child can grow in faith.¹³ It should be most emphatically stressed that this condition is subordinated to another principle taught by the Church, namely, that "baptism is necessary for salvation."¹⁴ This is why infant baptism should only be delayed on rare occasions. As pointed out by Krzywda, in many cases it is quite difficult, if not altogether impossible, to obtain certainty about the actual lack of a hope that the infant will receive a Catholic upbringing.¹⁵

In order to understand the expression "founded hope of Catholic upbringing," reference may be made to *Instrukcja duszpasterska Episkopatu o udzielaniu sakramentu chrztu świętego dzieciom* (*Pastoral Instruction of the Episcopate on the Administration of the Holy Sacrament of Baptism to Infants*) in which the Polish bishops explained how "education in faith" should be understood. In accordance with this document, it means the child is to be introduced to a deliberate relationship of friendship with Christ.

[This] ... is achieved by communicating the fundamental truths of faith and the principles of morality taught by the Catholic Church, and above all by teaching the children how to pray, introducing them to the life of the Catholic community (Sunday Mass), enrolling them in religion classes, introducing them to a full participation in the Eucharist and receiving the sacrament of confirmation, as well as helping them lead a mature and responsible Christian life.¹⁶

Another explanation of the term "education in faith" is provided in the Introduction to the *Rite of Baptism for Children*. "Christian formation, which is their due, seeks to lead them gradually to learn God's plan in Christ, so that they may ultimately accept for themselves the faith in which they have been baptized."¹⁷ The Fathers of the Second Vatican Council taught:

A Christian education does not merely strive for the maturing of a human person ..., but has as its principal purpose this goal: that the baptized, while

¹³ Cf. S.C. FOR THE CONGREGATION OF THE FAITH, Instruction on infant baptism *Pastoralis actio*, no. 15, 20 October 1980, in AAS, 72 (1980), 1144-1145; English translation in CLD, 9:515-516 [=SCDF, *Pastoralis actio*].

¹⁴ Ibid., no. 28.

¹⁵ Cf. J. KRZYWDA, "Sakramenty," in W. GÓRALSKI, E. GÓRECKI, J. KRUKOWSKI, J. KRZYWDA, P. Majer, B. ZUBERT (eds.), *Komentarz do Kodeksu prawa kanonicznego. Księga IV. Uświęcające zadanie Kościoła*, vol. III.2, Poznań, Pallottinum, 2011, 55 [= KRZYWDA, "Sakramenty"].

¹⁶ KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 2.

¹⁷ *Praenotanda*, no. 3, in *Rituale Romanum ex decreto Sacrosancti Oecumenici Concilii Vaticani II instauratum auctoritate Pauli PP. VI promulgatum Ordo Baptismi parvulorum*, editio typica altera, Typis Polyglottis Vaticanis, 1986, 15; English translation in *Rite of Baptism of Children*, ICEL, 1969.

gradually introduced to the knowledge of the mystery of salvation, become ever more aware of the gift of Faith they have received, and that they learn in addition how to worship God the Father in spirit and truth (cf. John 4:23), especially in liturgical action, and be conformed in their personal lives according to the new man created in justice and holiness of truth (Eph. 4:22-24); also that they develop into perfect manhood, to the mature measure of the fullness of Christ (cf. Eph. 4:13) and strive for the growth of the Mystical Body; moreover, that aware of their calling, they learn not only how to bear witness to the hope that is in them (cf. Peter 3:15) but also how to help in the Christian formation of the world that takes place when natural powers viewed in the full consideration of man redeemed by Christ contribute to the good of the whole society.¹⁸

Many suggestions concerning the upbringing of children in the family can also be found in Pope Francis's apostolic exhortation *Amoris laetitia*.¹⁹

The desire for the baptism of an infant, just as the assurance of authentic education in faith and Christian life, should be sincere.²⁰ Normally, the sincerity of intention is expressed through one's own practice of the faith and the fact that the decision to baptize an infant is not motivated merely by social convention.²¹ If the parents only wish to follow custom or avoid an unfavourable opinion in the eyes of society, they may not be embracing their obligation to educate the infant in the Catholic faith.²² The sincerity of their desire for baptism provides greater certainty that the child will be raised in the faith.

Baptism should be administered if the parents or guardians give assurances that, by education in the faith and the Christian life, the true meaning of the sacrament will be fulfilled. The assurance of Catholic education does not need to be based solely on "the parents' religious life" or on their guarantees.²³ According to the Congregation for the Doctrine of the Faith, such guarantees may be given by the parents or close relatives.²⁴ As pointed out by Janczewski, if such guarantees are given by persons other than the parents or guardians, it should be established whether these persons will have any

¹⁸ *Gravissimum educationis*, no. 2.

¹⁹ Cf. FRANCIS, Post-Synodal Apostolic Exhortation *Amoris laetitia*, nos. 29, 264, 287-290, 19 March 2016, at <https://w2.vatican.va>.

²⁰ Cf. SCDF, *Pastoralis actio*, no. 28.

²¹ Cf. K.T. HART, in *CLSA Comm1*, 1055.

²² Cf. SECOND PLENARY SYNOD, "Liturgia Kościoła po Soborze Watykańskim II," in *II Synod Plenarny (1991-1999)*, Poznań, Pallottinum, 2001, 200.

²³ E. SZTAFROWSKI, *Podręcznik prawa kanonicznego*, vol. 3, Warsaw, Akademia Teologii Katolickiej, 1986, 136-137.

²⁴ Cf. SCDF, *Pastoralis actio*, no. 28.2.

real influence on the child's education (e.g., grandparents who live with them). If the person giving assurances of Catholic education lives elsewhere, there may be lacking a founded hope that they will have any real influence on the religious education of the children.²⁵

Assurances which are unsatisfactory may be supplemented in various ways within the community of the Church.²⁶ Sufficient assurances include, among others, "the choice of godparents who will take sincere care of the child, or the support of the community of the faithful."²⁷ According to the Congregation for the Doctrine of the Faith, "any pledge giving a well-founded hope for the Christian upbringing of the child deserves to be considered as sufficient."²⁸ This indicates that varying circumstances may exist in individual cases, which may permit a finding that there is a founded hope for the Catholic upbringing of an infant.²⁹ It should be emphasized that, before the Code of Canon Law was published in 1983, documents issued by the Holy See referred to the condition of a well-founded hope that the infant would be provided a "Christian" education. Only since 1983 has reference been made to a "Catholic" education.

Hart observes that, in the ideal situation, *both* parents or guardians would share a willingness to have the infant baptized. He adds, however, that the willingness of just one of the parents or guardians suffices. Therefore, it may be concluded that a founded hope offered by only one of the parents or guardians that the infant will receive a Catholic education is sufficient.³⁰

Finally, it should be noted that, when admitting an infant to baptism, it is incorrect for the parents or guardians to be required to meet the conditions which the legislator requires of godparents. Thus, the parents do not need to be Catholics who have been fully initiated sacramentally and are not bound by any canonical penalty. The legislator does not require them to lead a life of faith, unlike godparents. The difference in requirements made of parents and godparents results from the fact that, while one may choose godparents, the same does not apply to parents. The only thing that the legislator expects for baptism to be licitly administered to an infant in normal circumstances is the existence of a founded hope that the infant will receive a Catholic upbringing. Naturally, the parents' attitude to faith is not without significance

²⁵ Cf. Z. JANCZEWSKI, "Wiara jako zasadniczy warunek przyjęcia sakramentu chrztu," in *Prawo Kanoniczne*, 56 (2013), no. 2, 54-56.

²⁶ Cf. SCDF, *Pastoralis actio*, no. 28.2.

²⁷ *Ibid.*, no. 30.

²⁸ *Ibid.*, no. 31.

²⁹ Cf. M. BLANCO, "Baptism," in *Exegetical Comm*, vol. 3/1, 469.

³⁰ Cf. K.T. HART, in *CLSA Comm1*, 1055.

in raising the child. Nevertheless, the fact that they live a life which is not compliant with the requirements of faith does not need to result automatically in a decision to delay the baptism of their infant. A person's potential disqualification as a godparent by the legislator does not automatically entail the obligation to delay the baptism of that person's child.

The pastor is usually able to ascertain whether there is a founded hope of the Catholic upbringing of the infant after talking to the parents. More difficult cases should not be decided mechanically; every case should be considered on its own merits.³¹

3 — *More Difficult Cases*

A founded hope is not necessarily lacking in the case of assurances made by parents who have little faith and practice their religion only occasionally, or even by non-Christian parents who request baptism for reasons that deserve consideration. In such cases, the choice of appropriate godparents or the support of the community of the faithful are very important factors lending credence to assurances given by the parents. In such cases, the infant may be baptized without delay, just like the children of parents who practice the Catholic faith.³²

In the opinion of the Polish bishops, the infants of parents who live in a civil partnership may be licitly baptized irrespective of whether there are any obstacles to regularizing their parents' sacramental situation or not. Before the baptism, the parents and godparents should make a written statement that they will bring up the infant in the Catholic religion.³³ Moreover, until it is legislated otherwise, a similar procedure seems to be justified in a situation when the child's parents are not bound by any legal relationship. The reason for this is that, pursuant to the norm stipulated in canon 19 *CIC*, if a custom or an express prescript of law is lacking in a certain matter, the case must be resolved in light of laws issued in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons. It should also be noted that Polish bishops do not make the decision on baptizing an

³¹ Cf. KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 2e.

³² Cf. SCDF, *Pastoralis actio*, no. 30; BLANCO, in *Exegetical Comm*, vol. 3/1, 469.

³³ Cf. KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 2b.

infant raised in a non-sacramental union conditional on the parents' decision concerning regularization of their non-sacramental situation.³⁴ However, it should be remembered that the motives behind a couple's failure to regularize their sacramental situation may contribute to the emergence of justified doubts as to whether the child will receive a Catholic education.³⁵

If only one of the parents is a believer, this is also not an obstacle to the infant's baptism.³⁶ The procedure to be followed by pastors in such circumstances is usually regulated by particular law.

As for the baptism of an infant of parents living in a homosexual relationship, this matter is not explicitly regulated by universal law. Pursuant to the above-cited canon 19 *CIC*, legal solutions in such cases should be sought in general principles of law. Since the parents or guardians of an infant live in a relationship which the Church does not recognize as a valid marriage, regulations issued in similar cases may be helpful in discerning the situation, in particular those which apply to the baptism of infants raised in so-called "irregular" situations. Irregular situations involve those of persons who are only married civilly, are divorced and remarried, or are only cohabiting.³⁷ The similarity between homosexual relationships and "irregular" situations consists in the fact that the persons concerned are living together in a situation which is objectively sinful (and are raising a child together), not because they can be compared to marriage. As Pope Francis points out in the Exhortation *Amoris laetitia*, no. 251: "as for proposals to place unions between homosexual persons on the same level as marriage, there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family."

When admitting infants raised in homosexual unions to baptism, particular attention should be paid to the motives behind the baptism and to the proper choice of godparents. It appears that baptism should not be delayed only because the parents or guardians live in a homosexual union, since "general rules set forth a good which can never be disregarded or neglected, but in their formulation they cannot provide absolutely for all particular situations."³⁸ A decision to delay the baptism of an infant of a homosexual union in normal circum-

³⁴ Cf. S. WELLENS, "Canons 852, 865, 868: The Lawful Reception of Baptism," in *RR* 1997, 65.

³⁵ Cf. Z. JANCZEWSKI, "Dopuszczanie do chrztu niemowląt w aspekcie odpowiedzialności za Kościół," in *Annales Canonici*, 2 (2006), 126.

³⁶ Cf. KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 2c.

³⁷ Cf. FRANCIS, *Amoris laetitia*, no. 78.

³⁸ *Ibid.*, no. 304.

stances may only be made if there is certainty about the lack of a founded hope of a Catholic education. However, the rite of baptism in such cases should be administered with prudence, making sure it can be done without public scandal to the faithful. It is also advisable to consult the local ordinary.

In the case of parents or guardians whose sacramental situation is irregular, the pastor discerns the existence of a founded hope of a Catholic upbringing and makes a decision based on general principles of canon law. This is done following a conversation with the parents, guardians, godparents and other persons willing to support the infant's parents. The pastor should guide the conversation so as to allow him to form an impression on the existence of a founded hope. In doubtful cases, the decision should be in favour of baptizing the infant.

According to Huels, infants who are the children of parents who seldom attend church may be baptized if there exists a founded hope that they will be brought up in the Catholic religion. In his view, the sole fact that the parents are not registered in the parish and do not attend Sunday Mass does not provide sufficient grounds to justify a delay in baptizing their infant.³⁹

Interesting comments on the baptism of the infant children of non-Christian parents and of "irregular" Christians are found in the advisory opinion issued by the Congregation for the Doctrine of the Faith for the bishop of the Diocese of Dapango in Africa in 1970. Although it was issued before the promulgation of the Code of 1983, it can be helpful in resolving difficult situations. Having first explained the term "irregular" Christians as referring to polygamous Christians, couples who are cohabiting without the benefit of marriage, lawful spouses who have abandoned their faith, or who request the baptism of an infant solely for social propriety, the dicastery provides guidelines. In the case of baptism requested by the above-mentioned parents, pastors should: 1) make them conscious of their responsibilities, 2) pass judgment on the sufficiency of the guarantees regarding the Catholic education of the infant—guarantees given by some member of the family, or by the godfather or godmother, or by support on the part of the community of the faithful; 3) if the pastor believes the conditions are met, baptism may be administered, as the infant is baptized in the faith of the Church; 4) if the conditions are not met, parents may be offered the opportunity to enroll the infant for baptism at a later date and to continue pastoral contacts to prepare for a later reception of baptism.⁴⁰

³⁹ Cf. J.M. HUELS, "Canon 868: Delay of Infant Baptism and Related Issues," in *RR* 1995, 67.

⁴⁰ Cf. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Reply, 13 July 1970, in *CLD* 7, 592-594.

Even though the legislator allows for baptism to be administered without at least one godparent when it is not possible to have one (c. 872 *CIC*), such a situation is the exception. In some cases, particularly if the parents' sacramental situation is irregular, the presence of a Catholic godparent may give a founded hope of the infant's Catholic upbringing.

4 — *Exception to Canon 868 §1, 2° CIC*

As has already been mentioned, by way of the *motu proprio De concordia inter Codices* of 31 May 2016, Pope Francis amended the provisions of canon 868 *CIC*.⁴¹ He added a third paragraph which provides that “infants of non-Catholic Christians are licitly baptized if their parents or at least one of them or the person who legitimately takes their place request it and if it is physically or morally impossible for them to approach their own minister.”⁴²

However, considering the issues discussed here, another amendment introduced by the Supreme Legislator is even more important. In canon 868 §1, 2° *CIC*, the Bishop of Rome included a reference to canon 868 §3 *CIC* (*firma* §3).⁴³ Consequently, from the effective date of the *motu proprio De concordia inter Codices*, the norm stipulated in canon 868 §1, 2° *CIC* allows for infants who are not in danger of death to be baptized without the existence of a founded hope of Catholic upbringing, provided that the conditions stipulated in canon 868 §3 *CIC* are duly met. In its new wording, canon 868 §1, 2° *CIC* provides: “For an infant to be baptized licitly: there must be a founded hope that the infant will be brought up in the Catholic religion, with due regard for §3” The purpose of the amendment made by Pope Francis is to conform the legislation of the Latin Church to that of the Eastern Catholic Churches. As a result of these amendments, the norms stipulated in

⁴¹ Cf. FRANCISCUS, *De concordia inter Codices*, arts. 4-5, 604.

⁴² Canon. 868 §3 *CIC*: Infans christianorum non catholicorum licite baptizatur, si parentes aut unus saltem eorum aut is, qui legitime eorundem locum tenet, id petunt et si eis physice aut moraliter impossibile sit accedere ad ministrum proprium. Unofficial English translation can be found in: *New motu proprio on harmonizing codes of canon law: full English translation*, available at <http://www.catholicerald.co.uk/news/2016/09/15/new-motu-proprio-on-harmonizing-codes-of-canon-law-full-english-translation/> (accessed on 05 November 2018).

⁴³ C. 868 §1 *CIC*: Ut infans licite baptizetur, oportet:
2° spes habeatur fundata eum in religione catholica educatum iri, firma §3; quae si prorsus deficiat, baptismus secundum praescripta iuris particularis differatur, monitis de ratione parentibus.

canon 868 *CIC* have been coordinated with the norms in canon 681 §§1, 4, 5 *CCEO*.

In this situation, the existence of a founded hope that the infant will be brought up in the Catholic religion by non-Catholic parents is not required. This results from the fact that, through a baptism administered in the circumstances referred to in canon 868 §3 *CIC*, the infant is ascribed to the Church of its parents or their legal representatives, not to the Catholic Church. The infant may be received into the Catholic Church only when the parents or the persons taking their place request it.⁴⁴

5 — Pastoral Challenges

The condition stipulated in canon 868 §1, 2° *CIC* is related to the provisions of canon 851, 2° *CIC*. The legislator makes it mandatory that the parents of an infant to be baptized and those who are to undertake the function of sponsor are to be instructed properly on the meaning of this sacrament and the obligations attached to it, particularly on the duty to provide the child with a Catholic education.⁴⁵ Gerosa considers the parents' instruction to be so essential that he makes the licit baptism of an infant in normal circumstances conditional on: 1) the consent of parents or guardians to the infant's baptism; 2) the existence of a founded hope that the infant will receive a Christian upbringing; and 3) proper instruction about the sacrament. The importance of such instruction results, in his opinion, from the fact that baptism given without prior evangelization contributes to de-Christianization.⁴⁶ An even firmer view is taken by Janczewski, who believes that "if the parents deliberately refuse to participate in instruction on the sacrament of baptism, this may suggest they are not prepared to perform their tasks—which justifies and makes a delay in baptism advisable, particularly if other factors come into play, such as failure to fulfill religious practices."⁴⁷

⁴⁴ Cf. D. SALACHAS, "Divine Worship, Especially the Sacraments (cc. 667-775)", in G. NEDUNGATT (ed.), *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches*, Rome, Pontificio Istituto Orientale, 2002, 503; idem, "De cultu divino et praesertim de sacramentis," in P.V. PINTO (ed.), *Commento al Codice dei Canonici delle Chiese Orientali. Studium Romanae Rotae. Corpus Iuris Canonici. II*, Libreria Editrice Vaticana, 2001, 568.

⁴⁵ Cf. BLANCO, in *Exegetical Comm*, vol. 3/1, 437.

⁴⁶ Cf. L. GEROSA, *Prawo Kościoła*, Poznań, Pallottinum, 1999, 190-191.

⁴⁷ Z. JANCZEWSKI, *Dopuszczanie do chrztu*, 124-125.

Responsibility for compliance with the provisions of canon 851 *CIC* rests on the parish priest, who should take care that parents are properly instructed through both pastoral advice and common prayer, bringing several families together and, where possible, visiting them. The wording of canon 851, 2° *CIC* reflects a norm the *Rite of Baptism for Children*.⁴⁸

In the opinion of the Polish bishops, “to provide appropriate instruction on the mystery of baptism, education in faith, the role of the apostolic example of godparents, and the liturgy of the sacrament, immediate preparatory catechesis should be provided.”⁴⁹ The type and length of instruction provided to parents or guardians should be adjusted to the particular “religious situation of the family” in which the child is to be raised. Aside from the “immediate preparation” referred to in no. 6 of the Bishops’ Instruction, parents and guardians should also be included in “remote” preparation long before the child is born.⁵⁰ This kind of preparation includes pastoral care of engaged couples and young spouses; reminding the parents of their responsibilities in awakening their children’s faith and educating them, and active participation in religious congregations and secular communities.⁵¹

As noted by Woestman, preparation is not identical to instruction. Rather, it should consist in formation and prayer. According to this canonist, in observing the norm of canon 868 §1, 2° *CIC*, two extremes are to be avoided: on the one hand, making no effort to prepare the parents and, on the other, misguided zeal that makes demands of the parents that are unreasonable in the concrete situation.⁵² An inflexible enforcement of norms smacks of legalism and can drive the weak in faith from the Church.⁵³

⁴⁸ *Praenotanda*, no. 5.1, in *Rite of Baptism for Children*.

Before the celebration of the sacrament, it is of great importance that parents, moved by their own faith or with the help of friends or other members of the community, should prepare to take part in the rite with understanding. They should be provided with suitable means such as books, letters addressed to them, and catechisms designed for families. The parish priest (pastor) should make it his duty to visit them or see that they are visited; he should try to gather a group of families together and prepare them for the coming celebration by pastoral counsel and common prayer.

⁴⁹ KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 6.

⁵⁰ Cf. R. SZTYCHMILER, “Prawa rodziców związane z chrztem dzieci,” in *Kościół i prawo*, vol. 10, Lublin, Redakcja Wydawnictw KUL, 1992, 107.

⁵¹ Cf. SCDF, *Pastoralis actio*, nos. 32-33.

⁵² Cf. WOESTMAN, *Sacraments: Initiation*, 46-47.

⁵³ *Ibid.*, 47.

“Immediate” preparation of parents for the sacrament of baptism should usually not last more than several weeks. Number 29 of the Instruction of the Congregation for the Doctrine of the Faith *Pastoralis actio* stipulates, *inter alia*, that when setting the date of baptism “the first consideration is the salvation of the child, that it may not be deprived of the benefit of the sacrament; [secondly], the health of the mother must be considered, so that, as far as possible she too may be present.” Only as a third factor on which the date of baptism is made dependent does the Congregation list the preparation of parents as long as this does not “interfere with the greater good of the child.” At the end of the norm, the dicastery has provided that “if the child is in danger of death, it is to be baptized without delay.” Otherwise, as a rule, “an infant should be baptized within the first weeks after birth.”

According to Blanco, given that an infant should be baptized as soon as possible after birth (cf. c. 867 §1 *CIC*), it would be inadmissible to deny or delay indefinitely the baptism of a child only to prepare better the parents or godparents. Such an approach would deny the exercise of fundamental rights, if there are grounds for hoping that the infant will be educated in the Catholic faith.⁵⁴

In theory, one can imagine a situation where the parents or guardians do not participate in immediate preparation for baptism, give their consent to the baptism of their infant only indirectly, and where guarantees of Catholic education are provided by godparents or family members, or by other members of the Church community. In the case of infant baptism, when only one parent or guardian gives consent, it is possible for immediate preparation only of the parent or guardian who gives guarantees of the infant’s Catholic education.

Finally, it should be noted that a conversation with parents who wish to have their infant baptized offers an opportunity for pastors to provide help in addressing any religious neglect in the family where the child will be raised.⁵⁵ If there is a founded hope of Catholic upbringing, the acceptance of such help may not be made a condition for baptism. In such a situation, the way the pastor communicates this should not give the impression that, unless the parents and guardians follow his suggestions to address any existing neglect, the infant will not be baptized. According to Pope Francis, preparation for a child’s baptism is an excellent opportunity to remind married

⁵⁴ Cf. BLANCO, in *Exegetical Comm*, vol. 3/1, 437.

⁵⁵ Cf. KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 4.

couples who have drifted away from the community of the Church after the wedding “of the beautiful ideal of Christian marriage and the support that our parishes can offer them.”⁵⁶ Preparation should strengthen the faith of the parents.⁵⁷ However, as pointed out by the Polish bishops in the Pastoral Instruction of 1977, “care should be taken to ensure that no disputes affect baptism or are settled directly before it, so that this joyful and solemn celebration is not disturbed.”⁵⁸

The concern of the community for the infant’s growth in faith should not be cut short after the baptism. It should be continued by the community, by giving an example of Christian life and participation in various forms of catechesis.⁵⁹ After the infant is baptized, pastors should assist parents with their care and advice, particularly during pastoral visits at home.⁶⁰

6 — *Delay of Baptism*

If a founded hope of Catholic upbringing is lacking, the pastor should delay the baptism. This delay should be aimed at “helping the family to grow in faith or to become more aware of its responsibilities.”⁶¹ The pastor should not leave the family to its own resources but should “keep in contact with the parents so as to secure, if possible, the conditions required on their part for the celebration of the sacrament. If even this solution fails, it can be suggested, as a last recourse, that the child be enrolled in a catechumenate to be given when the child reaches school age.”⁶²

Gerosa points out that, to prevent arbitrary delays in a matter as important as an infant’s baptism, in canon 868 §1, 2° *CIC*, the legislator has “stipulated three conditions which make such delay possible and legally valid.” These are: the requirement to ascertain that there is no hope the child will be brought up in the Catholic religion; the need to advise parents of the reasons

⁵⁶ Cf. FRANCIS, *Amoris laetitia*, no. 230.

⁵⁷ Cf. B. NOWAKOWSKI, “Czy zawsze „wyrzeczenie się zła”? Problemy prawne, teologiczne i liturgiczne przy udzielaniu sakramentu chrztu świętego dzieciom,” in *Prawo Kanoniczne*, 53 (2010), nos. 3-4, p. 78.

⁵⁸ KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 8.

⁵⁹ Cf. SACRA SONGREGATIO PRO DOCTRINA FIDEI, *Pastoralis actio*, nos. 32-33.

⁶⁰ KONFERENCJA EPISKOPATU POLSKI (POLISH EPISCOPAL CONFERENCE), *Instrukcja duszpasterska*, no. 8.

⁶¹ SCDF, *Pastoralis actio*, no. 31.

⁶² Cf. *ibid.*, no. 30.

for the delay; and compliance with the particular laws which regulate this matter.⁶³

As an example of a situation in which baptism should be delayed in view of there being no founded hope of Catholic upbringing, Huels says that this occurs when non-Catholic parents want to baptize their infant only so that the child can later be enrolled in a Catholic school in view of the fact that the level of education there is higher than offered by other educational institutions. Another example of circumstances when the decision to delay baptism is justified involves non-practicing Catholic parents who want to have their child baptized only so that they can please their parents and believe that the child itself will later decide whether or not to pursue religious education. In such a situation, according to Huels, baptism should be delayed at least until one parent consents to provide the infant with a Catholic education or permits someone else to fulfill this obligation.⁶⁴

It should be emphasized that unlike before the promulgation of the 1983 Code, if a hope of education in the faith of the Church is entirely lacking, baptism is no longer to be “denied” but “delayed.”⁶⁵ After a decision is made to delay baptism, in compliance with particular regulations, the time for the baptism is determined by the parish priest.⁶⁶

It should again be noted that, when children complete the seventh year of age, for the purposes of baptism they are treated as adults. From then on, their own intention to be baptized is necessary for the sacrament to be validly received. In the case of a person who has attained the use of reason, it is no longer canon 868 that applies but canon 865 *CIC* (cf. c. 852 *CIC*).⁶⁷

Conclusion

Even though the conditions provided in canon 868 §1, 2° *CIC* are necessary for the sacrament of baptism to be administered licitly (except in danger of the infant’s death), this does not impair their obligatory nature.⁶⁸ When

⁶³ Cf. GEROSA, *Prawo Kościoła*, 190-191.

⁶⁴ Cf. HUELS, in *RR 1995*, 68.

⁶⁵ Cf. HART, “Baptism,” 1056.

⁶⁶ Cf. *Introduction*, no. 8.4, in *Rite of Baptism for Children*.

⁶⁷ Cf. J.M. HUELS, “Canon 851: Right of a Minor to be Baptized Against the Wishes of Parents,” in *RR 1997*, 62-64.

⁶⁸ Cf. KRZYWDA, “Sakramenty,” 55.

admitting an infant to baptism, the conditions should be taken into consideration by the pastor.

While the former does not entail any major difficulties in pastoral ministry, the latter unfortunately does more and more frequently. It is often difficult to discern whether there is a founded hope of the infant's future Catholic upbringing, particularly in the case of an irregular sacramental situation of the parents or guardians. As Vatican II taught: "Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators. This role in education is so important that only with difficulty can it be supplied where it is lacking."⁶⁹ On the other hand, documents of the Holy See and a number of canonists emphasize that a founded hope of Catholic education exists also when such education is guaranteed not by the parents or guardians, but by third parties. This means that, in the case of baptism, the lack of education provided by the parents may be supplied by Catholic education provided by other persons, even though, according to the Council Fathers, this is particularly difficult to achieve.

When making the decision whether or not to admit an infant to baptism, it is necessary to find a delicate balance between the necessity of baptism for salvation and the necessity of establishing some assurances so that the gift of baptism may be recognized as such and the life of grace may develop in an appropriate environment.⁷⁰ It should also be remembered that canon 868 §1, 2° *CIC*—to the extent its provisions restrict the free exercise of rights—is subject to strict interpretation (cf. c. 18 *CIC*).⁷¹ Strict interpretation means that the wording of a regulation is construed as narrowly as necessary for the words to remain meaningful.⁷² If reasonable doubts arise as to whether a hope of the Catholic upbringing of an infant is lacking, considering the importance of baptism, the decision should be made in favour of the sacrament.⁷³ In difficult or doubtful cases, pastors may request the assistance of the local ordinary in making a decision.

⁶⁹ *Gravissimum educationis*, no. 3.

⁷⁰ Cf. M. BLANCO, in *Exegetical Comm*, vol. 3/1, 468.

⁷¹ Cf. WELLENS, in *RR 1997*, 64.

⁷² Cf. R. SOBAŃSKI, "Normy ogólne," in J. KRUKOWSKI and R. SOBAŃSKI (eds.), *Komentarz do Kodeksu prawa kanonicznego*, vol. I, Poznań, Pallottinum, 2003, 72.

⁷³ Cf. PIUS XII, *Allocutiones. Astantibus multis honorabilibus Viris ac praeclaris Medicis et Studiosis, quorum plerique Nosocomiis praesunt vel in magnis Lyceis docent, qui Romam convenerant invitatu et arcessitu Instituti Genetici «Gregorio Mendel», Summus Pontifex propositis quaesitis de «reanimatione» respondit*, no. V, 24 November 1957, in *AAS*, 49 (1957), 1030.

This text does not take into consideration the provisions of diocesan law.⁷⁴ In giving precision to general laws and regulations passed by the episcopate, such provisions may differ from one another.

⁷⁴ For example, the statutes of the 4th Synod of the Archdiocese of Warsaw (2003) on the matter under consideration provide as follows.

- Statute 245. Before baptizing an infant, the parents and godparents should participate in preparatory catechesis introducing them to the mystery of the sacrament and its liturgy.
- Statute 246. Infants of non-sacramental unions are baptized in the parish of the mother's place of residence. Before baptism, a conversation should be held with the parents and candidate's godparents in order to ascertain whether the infant will be brought up in the Catholic religion. If there is a founded hope of such upbringing, the parish priest admits the infant to baptism, and takes written guaranties from the parents and godparents on a predefined form. In the case of parents who make light of their own participation in holy sacraments, the baptism of their infant should be delayed (see Annex 11).
- Statute 249. Persons who have attained the use of reason but are under 14 years of age may be baptized with the written consent of their parents or legal guardians. In the case of an explicit objection from one of the parents or guardians, the opinion of the local ordinary should be sought.

SPONSORSHIP OF CATHOLIC HEALTH CARE AND OTHER APOSTOLIC WORKS IN THE CHURCH: LEGAL AND PRACTICAL ASPECTS*

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SUMMARY — This study explores sponsorship as an instrument whereby an institution or public ministry of the Church is carried forth in the name of, and in communion with, the family of faith. It also considers certain criteria for Catholic identity to be met in apostolic works carried out through various forms of sponsorship. The preservation of Catholic identity is one of the principal objectives of every sponsorship agreement, by which apostolic activities are undertaken in accordance with the mission, vision and identity of the apostolate. Sponsorship is in the process of being transformed and reshaped as it responds to challenges regarding the maintaining of Catholic identity. This study highlights certain canonical and practical perspectives for the development of various forms of sponsorship, which is constantly affected by social and economic changes.

RÉSUMÉ — Cette étude explore le parrainage en tant qu'instrument par lequel une institution ou un ministère public de l'Église est exercé au nom de, et en communion avec, la communauté de foi. Elle considère également que certains critères de l'identité catholique doivent être présents dans les œuvres apostoliques réalisées à travers diverses formes de parrainage. La préservation de l'identité catholique est l'un des objectifs principaux de tout accord de parrainage, aux termes duquel des activités apostoliques sont entreprises conformément à la mission, à la vision et à l'identité de l'apostolat. Le parrainage est en train de se transformer et de se redéfinir pour répondre aux défis liés au maintien de l'identité catholique. Cette étude met en évidence certaines perspectives canoniques et pratiques pour le développement de diverses formes de parrainage, qui sont constamment affectées par les changements sociaux et économiques.

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Introduction

For a long period of time, much of Catholic health care,¹ education and social services ministries were owned and administered by religious congregations. The various communities were able to carry out their apostolic activities because they had sufficient personnel and funds. However, because of significant changes in the composition of religious institutes, marked by sharp diminishment in many parts of the world, the Church began seeking newer models of supporting its apostolic works. Sponsorship became one instrument by which an institution or public ministry of the Church could be carried forth in the name of, and in communion with, the family of faith. For example, in many parts of the world, Catholic health care is in the process of being transformed and reshaped. It faces many challenges regarding its Catholic identity and the recognition of numerous new opportunities concerning future forms of sponsorship. Therefore, sponsorship is an important topic, not only from a theoretical point of view but also from a practical perspective, keeping in mind the social and economic changes which impact both Catholic identity and the mission itself. It is not the intention of this article to provide a full commentary on sponsorship, but rather to review certain canonical and practical aspects of health care ministry as supported by new forms of sponsorship.²

1 — The Origin of Sponsorship

The etymology of the word “sponsorship” is found in the Latin “spondere,” meaning “to make a solemn pledge”³ or to serve as a guarantor.⁴ The term “sponsorship” in relation to the apostolate of the Church emerged from the phrase “sponsoring body.” It was initially used by John J. McGrath in his work entitled *Catholic Institutions in the United States*:

¹ Editor’s note. This study observes the North American usage of two words for the noun (health care) and a single word for the adjective (healthcare).

² For an extensive bibliography on sponsorship, see John H. THORNBUR, “A Selected Bibliography on Sponsorship,” in M. CLEARY (ed.), *Public Juridic Persons in the Church: Conference Presentations*, Sydney, Australia, Governance & Management Pty Ltd., 2009, 121-130 (= CLEARY, *Public Juridic Persons in the Church*).

³ LEO STELTEN, *Dictionary of Ecclesiastical Latin*, Peabody, MA, 1995, 252.

⁴ FRANCIS G. MORRISEY, “Toward Juridic Personality,” in *Health Progress*, 82 (2001), no. 4, 27 (=MORRISEY, “Toward Juridic Personality”).

Canonical and Civil Law Status.⁵ According to him, a Catholic hospital became a public trust once a religious institute switched from an all religious board to a predominantly lay one. This reorganization changed the focus from canonical ownership by the institute to that of canonical sponsorship—a move comparable to the surrendering of parental status in favor of godparent status. Applied indiscriminately, what came to be known as the “McGrath thesis” had wide canonical and civil legal consequences for Catholic health care and education.⁶

In 1974, Adam Maida (future Cardinal Archbishop of Detroit) used the phrase “sponsoring body” in an article written in *Hospital Progress*. Without any direct reference to the McGrath thesis, he strongly disagreed with it, stating that lay trustees must acknowledge that the healthcare apostolate is an exercise of ministry within the Church and a practice of religion.⁷ His strong reaction against the McGrath thesis formed an interesting topic for a canonical debate which continues in the USA and elsewhere today.⁸

Apparently, the first formal use of the term “sponsorship” by the Catholic Health Association of the United States is found in a 1969 booklet entitled *Study of the Future Role of Health Care Facilities* under Catholic auspices in the United States. The first appearance of the term “sponsorship” in *Hospital Progress*, as distinct from Maida’s phrase, “sponsoring body,” was found in January 1975.

Congregations of Catholic sisters, brothers and priests established and operated some of the world’s largest non-public systems of education, social services and health care. Today, Catholic health care is a vast enterprise of

⁵ John J. McGRATH, *Catholic Institutions in the United States: Canonical and Civil Law Status*, Catholic University Press, Washington DC, 1968.

⁶ See Paul C. REINERT, “The Role of Religious in Management,” in *Hospital Progress*, (1967), no. 9, 59-61, 96-100. He was then the president of Saint Louis University. In this article, adapted from a speech he had given two months earlier to the annual Catholic Hospital Association (CHA) assembly, Reinert essentially endorsed McGrath’s position in the debate. McGrath himself addressed the 1968 CHA assembly. (*Hospital Progress* was the previous name of *Health Progress*. CHA was then the Catholic Hospital Association).

⁷ Adam J. MAIDA, “Identity of the Catholic Health Facility,” in *Hospital Progress*, (1974), no. 2, 65. See also IDEM, *Ownership, Control and Sponsorship of Catholic Institution: A Practical Guide*, Harrisburg, Pennsylvania Catholic Conference, 1975. Before writing this work, Maida had challenged the McGrath thesis in “Canonical and Legal Fallacies of the McGrath Thesis on Reorganization of Church Entities,” in *The Catholic Lawyer*, 19 (1973), 275-286.

⁸ The sale in 1997 of Saint Louis University Hospital to a for-profit corporation provoked a debate along the lines of the McGrath-Maida model. See Daniel C. CONLIN, “Sponsorship at the Crossroads,” in *Health Progress*, 82 (2001), no. 4, 21 (=CONLIN, “Sponsorship at the Crossroads”).

health systems, including hospitals, clinics, long-term care facilities and the continuance of other care services.⁹ It evolved from institutional works seen as a reflection and instrument for congregational identity.¹⁰ In this light, it is noteworthy to recall that “sponsorship” in its various forms became a pragmatic tool to organize and delineate responsibilities (e.g., reserved powers) as well as to ensure a place for health care within the life of the Church.¹¹

From the 1950s, many congregations, in response to advice from canon lawyers and others, connected to the energy of a developing ecclesiastical reality and incorporated their institutional ministries as separate legal bodies, to avoid potential civil action that otherwise might “pierce the corporate veil.” In a litigious society, the risk of numerous court suits could jeopardize the entire ministry. Not only did the congregations establish separate corporations for their hospitals, academies, colleges, and universities, but they also constituted separate governing boards (often including lay members) to govern the corporations. The purpose of this distinct civil structure was to erect a wall between the congregation and its institutional works.¹²

Initially, this form of sponsorship was focused on property ownership.¹³ Individual members of religious institutes considered themselves to be sponsors even though they were not owners, because they were members of the sponsoring body working within various institutions.¹⁴ However, there has been a clear movement away from this ownership model because of

⁹ The Catholic Health Association of the United States, “Ministerial Juridic Person: The Growing Role for Laity in Canonical Sponsorship of Catholic Health Care,” in *Health Progress*, 95 (2014), no. 5, 61 (=CHA, “Ministerial Juridic Person”).

¹⁰ Helen M. BURNS, “Reflections on Sponsorship: One Congregation’s Perspective,” in R. SMITH, W. BROWN and N. REYNOLDS (eds.), *Sponsorship in the United States Context: Theory and Praxis*, Alexandria, CLSA, 2006, 4 (=SMITH, BROWN, REYNOLDS, *Sponsorship in the United States Context*).

¹¹ Michael D. PLACE, “Elements of Theological Foundations of Sponsorship,” in *Health Progress*, 81 (2000), no. 6, 9.

¹² Mary K. GRANT, “Reframing Sponsorship,” in *Health Progress*, 82 (2001), no. 4, 38.

¹³ The question often occurs in regard to an incorporated apostolate: who is owner of the corporation? In response to this question, we should point out that the corporation itself is its legal owner. It has no owner other than itself, much the same way a natural person owns himself or herself. Members of charitable corporations are not the owners, nor are they shareholders. They may have reserved the right to have the final say in the certain enumerated corporate affairs. Such reserved powers of the members should be clearly stated in the corporate articles and bylaws of the incorporated apostolate. Adam J. MAIDA and Nicolas CAFARDI, *Church Property, Church Finances, and Church-related Corporations: A Canon Law Handbook*, St. Louis, Catholic Health Association, 1984, 213 (=MAIDA and CAFARDI, *Church Property, Church Finances, and Church-related Corporations*).

¹⁴ When dealing with not-for-profit undertakings, we do not speak of “ownership” but of “members” responsible for the undertaking.

inconsistencies between the civil and canonical understandings of the term.¹⁵ Additionally, the name of the institute was often found in the name of the sponsored institution. Following the Second Vatican Council, more emphasis began to be placed within Church circles on the dignity of the baptismal vocation, moving away from an almost exclusive reliance on the vocations of priesthood or religious consecration.¹⁶ An increasing number of persons also became directly involved in the decision-making processes. The expansion of lay leadership in the role of sponsor began in 1979, when the Catholic Health Corporation began the process of obtaining the status of a public juridic person.¹⁷

Initially, the duties of sponsorship were identified with those of the board of directors, which was primarily concerned with creating policies, rather than with actual delivery of services. The civil incorporation of the apostolic works, distinct from that of the sponsoring religious institute, led to the establishment of separate boards of directors, although sometimes the membership still overlapped with the sponsoring institute itself. Thereafter, further separation developed as a two-tiered structure was put in place, i.e., a distinction being made between the “members” of the corporation and the “board of directors.” In such instances, sponsorship responsibilities were generally retained by the “members” rather than by the “board,” although this was not universal. Relations between the “members” and the “board” were directed by the use of reserved powers. Although the 1983 *Code of Canon Law* makes little reference to what is currently known as “reserved powers” (see c. 87 §1), when they were first being considered as an acceptable mode of operation, some fourteen or so powers were considered to be essential, since institutes did not wish to part with their institutions too easily.¹⁸ Moreover, to facilitate coordination and reduce expenses, systems began to be established, grouping several works or institutions. This resulted in a further refinement of reserved powers, with some being operative at a lower level rather than at the membership level itself.¹⁹

¹⁵ Francis G. MORRISEY, “Various Types of Sponsorship,” in SMITH, BROWN and REYNOLDS (eds.), *Sponsorship in the United States Context*, 18 (= MORRISEY, “Various Types of Sponsorship”).

¹⁶ See Charles E. BOUCHARD, “Did Anyone Realize What Was Ahead? Catholic Health Care and Vatican II,” in *Health Progress*, 96 (2015), no. 6, 17-22.

¹⁷ CHA, “Ministerial Juridic Person,” 61.

¹⁸ For a listing of these reserved powers as initially understood, see Francis G. MORRISEY, “Our Sponsors Yesterday, Today and Tomorrow,” in *Health Progress*, 94 (2013), no. 4, 57-66.

¹⁹ St. Joseph’s Health System in Hamilton, ON, was one of the first of these systems in Canada.

Recently, a number of provinces of institutes and even institutes themselves have come together to sponsor their works jointly. At times, then, the reserved powers were exercised separately for institutions originally owned by a single institute as distinct from those owned by another sponsor. Thereafter, to simplify administration, many of these powers or responsibilities were delegated jointly on a permanent basis to the new board governing the joint sponsors, with only the property issues being reserved to the original sponsors. As institutes and dioceses amalgamated to operate institutions and works jointly, it became appropriate to establish new diocesan Church corporations—known canonically as “juridic persons”—to assume sponsorship of these joint ventures.²⁰ These works thereafter took on a life of their own, distinct from that of the original sponsoring institutes.²¹

In 1998-1999, the Catholic Health Association of the USA formed a group called the “Sponsors’ Special Committee” to advise the association’s members on the development of initiatives that responded specifically to sponsors’ needs. The Special Committee identified four core elements of sponsorship: fidelity, integrity, community, and stewardship. Ultimately, these elements became the basis for the tools with which Catholic health care assesses the strength of current sponsorship models and assists in the evolution of newer ones.²²

2 — *The Concept of Sponsorship in Canonical Writings*

Sponsorship has no legal definition in canon law.²³ Likewise, there is also no uniform recognition of it in civil law;²⁴ nevertheless, it is an important

²⁰ See CLEARY, *Public Juridic Persons in the Church*, 4 for a diagram representing the changes occurring in governance as religious institutes transitioned to new models of sponsorship.

²¹ In Canada, Covenant Health in Alberta and Providence Health Care in Vancouver are such examples of this.

²² For an extensive consideration of this aspect, see Jordan HITE, *A Primer on Public and Private Juridic Persons: Applications to Health Care Ministry*, St. Louis, Catholic Health Association, 2000, 37 (=HITE, *A Primer on Public and Private Juridic Persons*). See also Mary K. GRANT and Patricia VANDENBERG, *After We’re Gone: Creating Sustainable Sponsorship*, South Bend, IN, Ministry Development Resources, 1999.

²³ Sponsorship in canon law has little if any meaning if it is not related particularly to the mission and ministry of the Church. The Church’s mission is threefold: to teach, to sanctify, and to serve God’s people. Health care is one dimension of ecclesiastical service.

²⁴ Daniel C. CONLIN, *Canonical and Civil Legal Issues Surrounding the Alienation of Catholic Health Care Facilities in the United States*, Rome, Pontifical University of Saint Thomas, 2000; Melanie DIPIETRO, “A Juridic Meaning of Sponsorship in the Formal Relationship

phenomenon, particularly for religious engaged in apostolic activity. Adam J. Maida and Nicolas P. Cafardi noted that the term “sponsorship” is derived from Catholic sacraments and in particular from the baptismal liturgy in which the godparent makes the baptismal promises as the sponsor of the infant being baptized, but who at that moment is legally and physically incapable of doing so. The incorporated apostolate needs human persons to act on its behalf, i.e., to fund and to operate it.²⁵ On the other hand, Michael D. Place defines sponsorship as “the instrument by which an institution or public ministry of the Church is carried forth *in the name* of and in communion with the family of faith.”²⁶ The difficulty with this approach is that sponsorship is not an end in itself but a mediating category that brings together the religious dimension of Church life with what more often corresponds to an expression of the public ministerial life of the Church.²⁷ Sponsorship includes both a formal relationship expressed in legal documents and an informal one that represents a commitment to work together in service to the mission.²⁸ The formal relationship is between an authorized Catholic organization and a legally formed system or entity (e.g., hospital, clinic, nursing home or other institution) and is entered into for the sake of promoting and sustaining Christ’s healing ministry to people in

between a Public Juridic Person and a Healthcare Corporation in the United States,” in SMITH, BROWN, REYNOLDS (eds.), *Sponsorship in the United States Context*, 101-122; Patricia M. DUGAN, “The Sponsorship Relationship: Incorporation and Dissolution, Civil and Canon Law Perspectives,” in *Sponsorship in the United States Context*, 73-83 (=DUGAN, “The Sponsorship Relationship”); Beverly K. DUNN, *Sponsorship of Catholic Institutions, Particularly Healthcare Institutions, by the Sisters of Providence in the Western United States*, Canada, University of Ottawa, 1995 (=DUNN, *Sponsorship of Catholic Institutions*); Paul L. GOLDEN, “Sponsorship in Higher Education,” in SMITH, BROWN, REYNOLDS (eds.), *Sponsorship in the United States Context*, 85-99; Patricia TAVIS, *Discernment Process of the Sisters of Saint Dominic regarding the Continued Sponsorship of Its Secondary School*, South Orange, NJ, Seton Hall University, 2010.

²⁵ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-related Corporations*, 213. Daniel C. CONLIN pointed out that the term “sponsor” does not transfer well by analogy to Book V of the 1983 *Code of Canon Law*, which covers the temporal goods of the Church. To accept sponsorship responsibility for a person entering the Catholic faith is not the same reality as to claim ownership or sponsorship of a Catholic health care facility. In “Sponsorship at the Crossroads,” 20.

²⁶ Michael D. PLACE, “Elements of the Theological Foundation of Sponsorship,” in *Health Progress*, 81 (2000), no. 6, 6.

²⁷ *Ibid.*, 9.

²⁸ CATHOLIC HEALTH CORPORATION OF ONTARIO, *Working Together: A Core Document for Sponsorship and Governance*, Guelph, ON, 2010, 2 (=CHCO, *Working Together*).

need.²⁹ The relationship is formal in that it is guaranteed by civil and canon law and is “authorized” by a diocesan bishop, a conference of bishops, or the Holy See. The sponsoring organization can be a religious institute or a group of institutes that sponsor jointly. Likewise, it may be a diocese, parish or other canonical entity having juridic personality. While an entire institute or diocese may be regarded as a sponsor, specific individuals are always designated to carry out the duties of sponsorship.³⁰ However, sponsorship is much more than a formal legal relationship. It is also a dynamic approach to providing ministry, particularly complex ministry on an institutional scale, such as a health care system or hospital. Although the duties of sponsorship have something in common with those of governance, they arise from a different source—the relationship with the Church. Sponsors act not only in the name of the health care institution but also on behalf of the faith community engaged in continuing the compassionate healing ministry of Jesus.³¹

Apart from this, there is another point to keep in mind regarding the pastoral definition of sponsorship: sponsorship can be seen simply as the devising of ways to guarantee or ensure that the healing and educating mission of Christ continues within the Church through particular ministries, keeping in mind the rapidly changing circumstances in both Church and society. This definition emphasizes the fact that sponsorship is an action, bridging the gap between the Gospel and contemporary realities.³²

No matter which approach is preferred, it is generally accepted that “sponsorship” entails three important elements: (1) the use of a particular name; (2) the exercise of certain governance responsibilities that arise from this use; and (3) some form of accountability to Church authorities. For this reason, it often entails elements of “quality control.” To a certain extent, sponsorship could be considered somewhat parallel to a franchise. If there is no accountability, then there is a serious risk of fraud and deception. A person’s good name—whether that “person” is an individual or a group—is of primary importance, and sponsorship responsibilities are exercised in relation to what the name stands for. In our case, we are referring to works undertaken on behalf of the Catholic Church.

²⁹ Bonnie MACLELLAN, *Canonical Sponsorship of Catholic Health Care in the Province of Ontario, Canada: How to Retain Catholic Organizational Identity While Delivering Quality Health Care*, PhD diss., Faculty of Canon Law, Saint Paul University, Ottawa, 2017, 35.

³⁰ See CHA, *Core Competencies of Sponsor*, St. Louis, CHA, 2017, 8.

³¹ CHA, “Ministerial Juridic Person,” 60-61.

³² Gerald A. ARBUCKLE, “Sponsorship’s Biblical Roots and Tensions,” in *Health Progress*, 87 (2006), no. 5, 13.

Traditionally, sponsorship had emphasized a position of corporate strength and independence through ownership and some form of control via reserved powers. Today, however, sponsorship is considered to be a formal relationship between a recognized Catholic organization and a legally formed system or entity, such as a hospital, university, nursing home or some similar institution.³³ Sponsorship in the Catholic sense has little meaning unless it is related to the threefold mission and ministry of the Church — to teach, to sanctify, and to serve through governance. Health care is one of the elements of service.³⁴

As various theological and historical studies have shown, the term “sponsorship” is relatively new in Church circles. It was originally given wide circulation as part of a threefold approach to health care works: ownership, sponsorship and control. Over time, however, the distinctions among these three dimensions have become increasingly blurred. For instance, one can have sponsorship with or without ownership; ownership with or without control, or with very little control; and control with various forms of sponsorship.

3 — *Elements of Catholic Identity in a Sponsored Apostolic Work*

As an apostolic activity, Catholic health care was owned and administered by Catholics. Strong Catholic identity was a means of providing care for many who could hardly afford it and providing space within which Catholic principles and values could be observed in the delivery of health care. Changes inspired by Vatican II (*GS* 1), and engagement of governments in health care through religious institutes and their institutional consolidation, meant that the Church had to spell out its identity in sponsored apostolic works.³⁵

The 1983 *Code of Canon Law* does not specifically outline the criteria for Catholic identity. This could be considered a lacuna (c. 19) in the law; however, it allows for flexibility in further examining the concept of Catholic identity. It should be noted that the Catholic identity of an apostolic work is complex, especially for many educational and healthcare institutions. In each

³³ Michael D. PLACE, “Towards a Theology of Catholic Health Care Sponsorship — A Work in Progress,” in *Health Progress*, 85 (2004), no. 1, 9.

³⁴ MORRISEY, “Toward Juridic Personality,” 27.

³⁵ Bryan HEHIR, “Catholic Identity Then and Now,” in *Health Progress*, 96 (2015), no. 6, 5 (=HEHIR, “Catholic Identity Then and Now”).

particular Church, there can exist institutions with their own identity and reason for existing, as well as with their own specific purposes.³⁶ We are dealing with a *process* and, as such, there is no ultimate answer as to what will constitute Catholic identity.³⁷ As life evolves, so too do the medical techniques and the business practices applied to everyday situations. Within this evolving context, the Catholic organization is to seek its own identity so that it will be made secure for the future, taking into account existing government legislation and the evolution of sponsorship practices.

Turning our attention more specifically to health care, we note that the Catholic Health Alliance of Canada in its *Health Care Ethics Guide* gives more substance in defining Catholic healthcare identity. It states: "Catholic health care institutions are communities of service, united through collaborative activities and inspired by Roman Catholic moral principles, for the purpose of promoting a healthy society." There are different ways of approaching the issue of Catholic identity, and no single approach can claim superiority over the others.³⁸ For instance, Cardinal Avery Dulles recognized "communion" as an approach in defining Catholic identity.³⁹ On the other hand, Mark Shaw recognizes a pastoral paradigm as essential in defining Catholic identity.⁴⁰ Taking into account all factors, we distinguish three ways of approaching the question of the Catholic identity of healthcare institutions, namely, using criteria derived from (1) the law, (2) doctrinal commitment, and (3) traditional Catholic values. All three approaches require communion with the diocesan bishop.

Criteria derived from canon law, both from the Code and other canonical sources, provide a precise manner of establishing the lines of authority and responsibility in the Church. Seven criteria are applicable to every Catholic healthcare organization. The organization must: (1) be established by ecclesiastical authority; (2) have its statutes recognized by such authority (c. 117) or originate as an apostolate of an established religious institute; (3) be guided by Church authorities, particularly the diocesan bishop

³⁶ See CHA, *The Search for Identity: Canonical Sponsorship of Catholic Health Care*, St. Louis, CHA 1994, 20-21 (= CHA, *The Search for Identity*).

³⁷ Francis G. MORRISSEY, "How to Approach Catholic Identity in Changing Times," in *Health Progress*, 75 (1994), no. 3, 23. "Some of the answers that are proposed today might eventually be found to be wrong, or not complete; some might even produce negative effects rather than the hoped-for ones that humanity is desperately seeking."

³⁸ CHA, *The Search for Identity*, 21-23.

³⁹ For a broader consideration of this aspect, see Avery DULLES, *Models of the Church*, New York, Doubleday and Co., 1987, 34-46.

⁴⁰ Mark SHAW, "A Pastoral Paradigm of Catholic Health Care," in *Australian E Journal of Theology*, (2008), no. 1, 1-19.

(cf. c. 804); (4) demonstrate Catholic values;⁴¹ (5) if not a public juridic person, have the permission of the competent ecclesiastical authority to call itself a Catholic entity;⁴² (6) be bound by canon law concerning the organization of pastoral care and the administration of property; and (7) be subject to visitation by the diocesan bishop.⁴³

Criteria derived from a doctrinal commitment are based on Church principles directed more to the organization's purpose than to its structure. In accordance with this approach, to be Catholic an organization must meet the following criteria: (1) have a general apostolic purpose—to help others—based on the personal commitment of those involved in it;⁴⁴ (2) have results appropriate and proportionate to the activity; (3) be perceived by the faithful as “Catholic”;⁴⁵ (4) be permeated by catholicity, in the sense that it has, for example, a religious name, a general relation to the Holy See, Catholic traditions, or religious symbols displayed; (5) correspond to a need that is perceived as being in harmony with the purposes of the Church.

Criteria based on values are derived from the values the institution identifies which are to be promoted and safeguarded by persons responsible for the work of the Catholic institution or association. The Catholic organization must: (1) be recognized as an apostolic activity which adheres to Catholic values and ethics in all its undertakings; (2) be present to unfortunate members of society afflicted with sickness and various forms of suffering, at times offering free services to those in need; (3) take a holistic approach toward the human person, body, soul and mind; (4) respect the human dignity and self-determination of the individual;⁴⁶ (5) use natural and social resources prudently and in service to all in keeping with the responsible stewardship of temporal goods, which is one of the pillars of the Church's

⁴¹ See JOHN PAUL II, Apostolic Constitution *Ex corde Ecclesiae*, 15 August 1990, no. 13, in AAS, 82 (1990), 1475-1509; James H. PROVOST, “The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*,” in *Studia canonica*, 25 (1991), 155-156 (= PROVOST, “The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*”); Ignacio GRAMUNT, “Autonomy and Identity of Catholic Universities in the United States,” in *Ius Ecclesiae*, 4 (1992), 473-476.

⁴² The 1983 Code provides in four canons for the name “Catholic” (cc. 216; 300; 803 §3 and 808).

⁴³ Francis G. MORRISEY, “What Makes an Institution Catholic?” in *The Jurist*, 47 (1987), 531-544.

⁴⁴ This means to be cost effective in terms of persons, time, and financial resources.

⁴⁵ An example is operating under the auspices of a Catholic group and being considered trustworthy as a result.

⁴⁶ Michael D. MCGOWAN, *The Canonical Status of Catholic Health Care Facilities in the Province of New Brunswick in Light of Recent Provincial Government Legislation*, E. Mel-len Press, 2000, 94 (=MCGOWAN, *The Canonical Status of Catholic Health Care*).

social teachings; (6) be committed in its corporate decisions to the preferential option for the poor, particularly to providing high quality care to those who would otherwise be deprived of it; (7) be characterized, in all its activities, by a concern for the human person,⁴⁷ who has intrinsic spiritual worth at every stage of his or her development; (8) be respectful of each person's needs and right of self-determination in keeping with his or her dignity, social nature, and the common good; (9) be respectful of human life and of suffering and death in the context of a full life; and (9) offer a service, not simply a commodity to be exchanged for profit.

In all these criteria, there is a common thread—the link with the diocesan bishop. In fact, if a work is not in communion with the diocesan bishop, it cannot be considered Catholic (see c. 394 §1).

Later on, the Catholic Health Association of the United States (CHA) elaborated criteria of Catholic identity of healthcare institutions, grouping them around four critical themes: (1) mission, (2) sponsorship, (3) holistic care, and (4) ethics. Mission should be the driving force by which decisions are made and by which structures and systems are developed.⁴⁸ Traditionally, sponsorship has emphasized a position of corporate strength and independence through ownership and control via reserved powers.⁴⁹ Holistic care means the relationship of emotional, intellectual, occupational, physical, and spiritual aspects of personhood through the entire process of healthcare delivery. The fourth factor is ethics. Ethics is critical to promoting and supporting the identity and integrity of Catholic health care as a whole, and of individual Catholic health care organizations.⁵⁰ It is obvious that these four areas—mission, sponsorship, holistic care, and ethics—cannot be separated, since one without the other would lead to an incomplete Catholic presence. Of course, it is difficult to evaluate whether these criteria are operative to a required degree, but that does not mean that they can simply be overlooked. Nevertheless, we have to keep in mind that Catholic identity is not something given once and for all but a goal that must be maintained and fostered, something that requires committed leadership both from within the institution and

⁴⁷ See Brian SMITH, "A Holistic Approach to the Business of Catholic Health," in *Health Progress*, 96 (2015), no. 6, 65-67.

⁴⁸ MORRISEY, "Various Types of Sponsorship," 22.

⁴⁹ Francis G. MORRISEY, "Catholic Identity of Healthcare Institutions in a Time of Change," in R. TORFS (ed.), *A Swing of the Pendulum. Canon Law in Modern Society*, Leuven, Uitgeverij Peeters, 1996, 56. Cf. DUNN, *Sponsorship of Catholic Institutions*, 137-155.

⁵⁰ Ron HAMEL, "Strengthening the Role of Ethics in Turbulent Times," in *Health Progress*, 91 (2010), no. 3, 60.

from outside it.⁵¹ Catholic identity cannot be reduced to definitions and procedures. It is something greater than these—it is a matter of the heart and spirit.⁵²

4 — *Evolving Forms of Sponsorship*

In the 1983 *Code of Canon Law*, one can find references to a few vehicles for carrying out apostolic activities. These include juridic persons, both public and private; associations of the faithful, both public and private; and other entities that do not have a formal canonical status.⁵³ Among these, the most frequently used models of direct sponsorship include the religious institute, the diocese, or a public association of the Christian faithful.⁵⁴ The determination of which structure is the most appropriate depends on local circumstances and needs.

4.1 — A Public Juridic Person⁵⁵

Within the Church, a public juridic person is somewhat analogous to a corporation in civil law. It is one of the entities giving canonical effects to

⁵¹ John BEAL, “From the Heart of the Church to the Heart of the World: Ownership, Control and Catholic Identity of Institutional Apostolates in the United States,” in SMITH, BROWN, REYNOLDS (eds.), *Sponsorship in the United States Context*, 43.

⁵² Doris GOTTEMÖLLER, “Preserving our Catholic Identity,” in *Health Progress*, 80 (1999), no. 3, 18.

⁵³ John K. MURPHY asserted that healthcare institutions can be operated by the following types of organizations: (1) healthcare institutions totally owned and operated by a public juridic person of the Catholic Church; (2) healthcare institutions owned by secular authorities, but operated under contract by a public juridic person of the Catholic Church; (3) healthcare institutions inspired by a Catholic tradition, even though no longer officially Catholic; (4) public healthcare institutions that contain a Catholic component; (5) healthcare institutions which have entered into joint ventures or other cooperative programs. *The Governance of Church Institutions and Protection of Catholic Identity with Particular Reference to Ontario, Canada*, Rome, Pontificia Università Lateranense, 1995, 92-93 (=MURPHY, *The Governance of Church Institutions and Protection of Catholic Identity*).

⁵⁴ DUGAN, “The Sponsorship Relationship,” 78; Bernard C. HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation as They Relate to Catholic Church Entities in the United States: A Diocesan Attorney Perspective,” in *The Catholic Lawyer*, 41 (2001), no. 1, 19 (=HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation”).

⁵⁵ For an extensive consideration of this aspect, see CHA, *A Guide to Understanding Public Juridic Persons*, St. Louis, CHA, 2012, 97, especially 87-97 for examples of approved statutes of a number of public juridic persons.

an incorporated apostolate. It enables people to come together to perform a work or a mission that otherwise they would be unable to do on their own.⁵⁶ For this reason, various forms of the public juridic person are the most popular in terms of evolving models of sponsorship.⁵⁷

In accordance with canon 116 §1, juridic persons are “aggregates of persons or of things which are constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfill in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good.”⁵⁸ If a religious congregation and a diocese strive to come together to operate certain institutions, they usually establish a juridic person for the incorporated apostolate so that it will have effects in the canonical legal order.⁵⁹ To this end, a decree of a competent ecclesiastical authority is required. If the ministry involves health care sponsored by a pontifical religious institute, the petition for distinct juridic status should be directed to Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. In the situation of bishop seeking to establish a diocesan institution as a public juridic person of pontifical right, that petition would be addressed to the Congregation for the Clergy.⁶⁰ This means that a public juridic person of pontifical right is constituted by the Apostolic See and is accountable to it.⁶¹ On the other hand, a public juridic person of diocesan right is constituted by the diocesan bishop and accountable

⁵⁶ Michael D. McGOWAN, *Governance/Sponsorship Models of Canadian Catholic Health Care Organizations*, Ottawa, Catholic Health Association of Canada, 1998, 11.

⁵⁷ Among others, Alberta Catholic Health Corporation (Covenant Health), Catholic Health Sponsors of Ontario, St. Joseph's Health System, Hamilton, ON, St. Joseph's Health Care Society, London, ON, Fontbonne Health Care Society, Peterborough, ON (now integrated into Catholic Health Sponsors of Ontario), and then Chara Health Care Society in British Columbia (now Providence Health Care) have in recent years been established in Canada by a formal decree of the competent ecclesiastical authority as public juridic persons of pontifical or diocesan right.

⁵⁸ For an extensive consideration of juridic persons and a careful analysis of the historical development of the canons, see Joseph FOX, “Introductory Thoughts about Public Ecclesiastical Juridic Persons and Their Civilly Incorporated Apostolates,” in PONTIFICIA STUDIUM UNIVERSITAS A SANCTO THOMA AQUINATE IN URBE, *Acts of the colloquium: Public Ecclesiastical Juridic Persons and Their Civilly Incorporated Apostolates*, e.g. *Universities, Healthcare Institutions, Social Service Agencies, in the Catholic Church in the U.S.A.: Canonical, Civil Aspects*, Rome, 1998, 231-258; Albert GAUTHIER, “Juridical Persons in the Code of Canon Law,” in *Studia canonica*, 25 (1991), 77-92 (=GAUTHIER, “Juridical Persons in the Code of Canon Law”).

⁵⁹ See MORRISEY, “Toward Juridic Personality,” 29.

⁶⁰ DUGAN, “The Sponsorship Relationship,” 80.

⁶¹ E.g., Catholic Health Ministry in 2000 was established by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. See Mary KELLY and Mary MOLLISON,

to him.⁶² To obtain public juridic personality, the same authorities must approve the statutes (c. 117) and any subsequent changes.⁶³

In accordance with canon 114 §2, the purposes of a juridic person are to carry out works of piety, the apostolate, or charity. This canon provides that a juridic person would not be true to its purpose if it engaged in purely secular activity.⁶⁴

Public juridic persons recognize that they operate “in the name of the Church;” their temporal goods are ecclesiastical goods and are governed by the canons and their own statutes (c. 1257 §1). It is worth noting that temporal goods which have been acquired legitimately belong to the juridic person (c. 1256) and not to the original sponsoring institute. This does not always correspond to civil realities, because a work could have distinct civil personality (corporate status) yet not have canonical status or vice versa. If all the goods were registered civilly under one corporation, that corporation, not the subsidiary, would be considered the legitimate civil owner. Moreover, not every healthcare organization has acquired separate juridic personality, just as not every apostolic work has been separately incorporated civilly. Because of the financial consequences, many religious institutes and dioceses are trying to determine which of their works and institutions have received canonical juridic personality. Obtaining juridic personality is highly recommended for a Church entity to carry out its healthcare ministry, as it assures canonical control by the juridic person for founding and/or sustaining an incorporated apostolate.⁶⁵ This juridic personality is distinct from that of the sponsoring diocese or religious institute; as a consequence, this helps in determining which temporal goods belong to the works and which belong to the sponsor. This also enables them to make certain that their particular

“Journey into Sponsorships’ Future,” in *Health Progress*, 86 (2005), no. 2, 50 (= KELLY and MOLLISON, “Journey into Sponsorships’ Future”).

⁶² In Canada, unlike the United States, requests to the Holy See for juridic personality are sometimes made jointly by the sponsoring religious congregations and the bishops of the territories involved. For instance, Catholic Health Sponsors of Ontario, a public juridic person, was established in a way that allows the Catholic Health Association of Ontario (which is jointly sponsored by the bishops and the owners of health care institutions) to assume the seat of any congregation wishing to withdraw from sponsorship of the juridic person. Catholic Health Sponsors of New Brunswick is a joint effort between bishops and religious institutes. Similar arrangements are found with Catholic Health Sponsors of Manitoba where the bishops involved are members of the board of the juridic person.

⁶³ PROVOST, “The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*,” 169.

⁶⁴ HITE, *A Primer on Public and Private Juridic Persons*, 6.

⁶⁵ *Ibid.*, 37.

rights and obligations are duly respected. It also allows the undertaking to maintain its Catholic character and presence in the healthcare system, since it acts in the name of the Church. As increasing numbers of religious institutes withdraw from the actual ownership and control of healthcare facilities, the public juridic person model allows for their legacy to continue in a formally recognized way.

There are a number of advantages arising from the establishment of a public juridic person. For instance, this model is structured in such a way as to build into its governance a continuity not dependent on the presence of religious; it promotes lay involvement within the healthcare system; and, finally, it frees individual religious to pursue other forms of healthcare activities and roles. Two possible disadvantages apparent with the public juridic person model of healthcare sponsorship are the possibility of putting such a new arrangement in the public eye too quickly and, depending on the size of the organization, individual help may not always be readily available for this new model in the event of difficulties and problems. Issues surrounding mission and Catholic identity continue to surface, as does the necessity of finding truly qualified lay persons knowledgeable about the public juridic person and mission effectiveness associated with this model of health care.⁶⁶

It is worth adding that the form of juridic person in which the laity join with religious and/or clergy to carry out the role and responsibilities of sponsorship is now more commonly called a “ministerial juridic person” (MJP) to distinguish it from other juridic persons, such as dioceses and parishes.⁶⁷

4.2 — A Private Juridic Person

A private juridic person is a new category in the 1983 *Code of Canon Law*.⁶⁸ This type of canonical personality is granted only through a special decree by competent ecclesiastical authority (c. 116 §2). The initiative comes from the individuals involved.⁶⁹ A private juridic person does not come into existence by virtue of the law itself. It also does not act in the name of

⁶⁶ See John H. THORNBUR and Michael GAFFNEY, *Governing in Faith. Foundations for Formation*, Ballarat, Connor Court Publishing, 2014. In this publication, the authors outline principles for the ongoing formation of lay persons who assume sponsorship responsibilities for various apostolic activities.

⁶⁷ CHA, “Ministerial Juridic Person,” 61. See also Peggy MARTIN et al., *Temporal Goods at the Service of the Mission of Ministerial Juridic Persons*, St. Louis, CHA, 2017, 112.

⁶⁸ See GAUTHIER, “Juridical Persons in the Code of Canon Law,” 77-92.

⁶⁹ PROVOST, “The Canonical Aspects of Catholic Identity in the Light of *Ex corde Ecclesiae*,” 170.

Church but in its own name, although it is brought into existence by the Church and is accountable to it in accordance with its statutes. These statutes must be approved by the competent authority (c. 117), and they should provide norms for the private juridic person in terms of purpose, constitution, membership and government. The temporal goods of private juridic persons are not ecclesiastical goods and are governed by their own statutes, not by the norms of Book V of the *Code of Canon Law*, unless some other provision is expressly made (c. 1257 §2).⁷⁰

In terms of advantages or disadvantages regarding the existence of a private juridic person, a possible advantage to private juridic status is that fewer formalities are involved in financial transactions and undertakings, so it is easier for those involved to operate according to their civil charter and the Church's general norms for apostolic activities. On the other hand, the private juridic person does not share in the Church's mission as integrally as does the public juridic person, since the private juridic person does not formally act in the name of the Church. It should be added that private juridic persons offer a degree of flexibility in providing an alternative sponsorship model in the healthcare apostolate. A few private juridic persons have thus been established. *PeaceHealth* (State of Washington, USA) is probably the best known and, to date, is the only one with pontifical recognition.⁷¹

Some of the larger Catholic health care systems do not have distinct canonical status but operate under the aegis of a sponsoring religious congregation or a society of apostolic life.⁷² However, the more congregations or dioceses are involved, the greater the need for some appropriate form of canonical recognition distinct from that of the sponsoring entities. In such cases, only canonical recognition can give the sponsored organization the autonomy it requires.

This mechanism, whether a public or a private juridic person, is used more particularly in the United States, Canada, Ireland⁷³ and Australia.⁷⁴ In other countries, it is more common to establish foundations or charitable

⁷⁰ HITE, *A Primer on Public and Private Juridic Persons*, 7.

⁷¹ MORRISEY, "Toward Juridic Personality," 29.

⁷² For instance, *Dignity Health* did not have distinct canonical status. However, since it became part of *CommonSpirit Health* (name made public on November 15, 2018), it now shares in the canonical recognition of this new pontifical entity.

⁷³ See Laurence KEARNS, *New Governance for Ancient Hospitality. The Founding of Saint John of God Hospitaller Ministries*, Stillorgan, 2018, 119. This work refers to the establishment of the St. John of God Hospitaller Ministries as a pontifical ministerial juridic person in Ireland.

⁷⁴ See CLEARY, *Public Juridic Persons in the Church*, for illustrations of how this model has been applied in Australia.

trusts to look after the temporal goods involved in the healthcare, social services and educational ministries.⁷⁵ However, two issues are arising in relation to the juridic person model. Theologically, it was based on a baptismal-confirmation model, but today we have a number of persons who are not Catholic, or not baptized, serving as members of the MJP. To what extent can they act in the name of the Church? Likewise, some MJPs sponsor public works whose activities are not always in conformity with Catholic ethical principles, such as public or community hospitals where sterilizations take place. To what extent can a juridic person sponsor a work that is not in accordance with Church teaching? The answers to these questions are still being sought.

4.3 — Associations of the Faithful and Other Persons

Another solution to provide for continuity in healthcare activity is the association of the faithful.⁷⁶ The 1983 *Code of Canon Law* distinguishes two types: public and private associations of faithful. In the drafting of the Code, this distinction was understood as arising from whether the group was founded by ecclesiastical authority or upon the initiative of the Christian faithful. However, overlaid atop this simple distinction is the fact that a public association of the faithful becomes such by law. If an association of the faithful was given this public personality (c. 312 §2), it received at the same time a mission for the purposes which it proposes to pursue in the name of the Church (c. 313). It is subject to the canonical provisions on public juridic persons.

A private association of the faithful can be described as a “group of Christian faithful who have united on their own initiative, according to specific statutes for an apostolic work, or ministerial purpose.”⁷⁷ It can acquire juridic personality through a formal decree of the competent ecclesiastical authority (c. 322 §1). If it has not been constituted as a juridic person, it cannot be a subject of obligations and rights (c. 310).

⁷⁵ Francis G. MORRISEY, “New PJP Model. A Leap of Faith,” in *Health Progress*, 92 (2011), no. 2, 68 (=MORRISEY, “New PJP Model”).

⁷⁶ Historically, associations of the faithful emerge from the desire to foster either the practice of the corporal works of mercy or the development of the spiritual life among their members. Juridic persons historically emerge from the need to define property ownership and accountability. A goal of juridic personality is to ensure the means for continuance of the work. See William J. KING, “Sponsorship by Juridic Persons,” in SMITH, BROWN, REYNOLDS (eds.), *Sponsorship in the United States Context*, 2006, 54.

⁷⁷ Roch PAGÉ, “Associations of the Faithful in the Church,” in *The Jurist*, 47 (1987), 191-196.

In terms of advantages or disadvantages regarding the existence of associations of the faithful, private associations of the faithful focus more on the members than on their work, while a juridical person would focus more on the work itself.⁷⁸ The temporal goods of a private juridic person are administered in accordance with the statutes, without prejudice to the right of competent ecclesiastical authority to exercise vigilance (c. 325 §2).

The 1983 *Code of Canon Law* distinguishes two types of apostolic activity which do not seek recognition as a juridic person: (1) a private association of the faithful which does not seek such recognition (c. 310); and (2) individuals who undertake their activity according to their own state and condition (c. 216). Both of them require consent of the competent ecclesiastical authority to use the word “Catholic” in the institution’s title.

Because of declining members of religious institutes, some of them feel obliged to withdraw from healthcare organizations. With the appropriate authorizations, they can turn the work over to another institute, a diocese, an association of the faithful, or another juridic person which then assumes responsibility for running it. They can also turn the work over to individuals to operate it on behalf of the juridic person. However, as long as the sponsoring congregations are fully viable and capable of exercising full control of their sponsored works, it is neither necessary nor opportune to turn them over to individuals.

5 — *Common Elements in Sponsorship Agreements*

The Catholic healthcare provider should become familiar with the appropriate general prescriptions of Church law which establish parameters allowing institutions to enter into certain types of contracts or agreements with other providers. All Catholic sponsorship agreements, including those made with religious institutes and non-Catholic parties, must ensure that Catholic health and social care issues are dealt with in accordance with the mission, vision and Catholic identity of the incorporated apostolate. All parties should clearly determine the ministry’s identity, common purpose, governance structures, rights and obligations of the parties, to avoid any misunderstandings along the way. It requires great precision of language to ensure clarity in the desired relationship.⁷⁹

⁷⁸ MORRISEY, “What Makes an Institution Catholic?” 538-539.

⁷⁹ DUGAN, “The Sponsorship Relationship,” 78.

When cooperative arrangements are made between parties, consideration needs to be given a number of elements of Church law, if the work is to remain Catholic. These include correct administrative procedures for property administration in accordance with canon law and the observance of moral teachings in medical procedures. Some decisions should be reserved to the major superior and council, keeping in mind the need on some occasions to seek out the opinion of the diocesan bishop. When non-Catholic parties are involved, the standard practice is to ensure that the healthcare facility will continue to be operated as a nonprofit corporation.⁸⁰

In healthcare agreements, it is common for property to be administered in accordance with canon and civil law requirements. A clear distinction should be made between goods belonging directly to the juridic person and those entrusted by some other authority for a specific work. The legal usage of property entrusted to Catholic health care must be carefully framed in every agreement. Lack of clarification would permit performing medical procedures inconsistent with applicable ethical and religious directives (often referred to as “ERDs”). A Catholic health facility would have to refuse to perform certain medical procedures. In this respect, the diocesan bishop is to exercise vigilance to prevent abuses from creeping into ecclesiastical discipline, especially regarding the administration of goods (c. 392 §2). An administrator must be ready to show the proper ecclesiastical authorities that the temporal goods are being prudently and carefully administered and that the work’s policies are in conformity with Catholic teaching.

When cooperative arrangements are being considered between Catholic and non-Catholic institutions, the moral issues involved must be taken into consideration to avoid any misunderstandings. Documents, such as the *Health Ethics Guide* approved by the Canadian Conference of Catholic Bishops⁸¹ and the proper laws of the sponsoring institute, can provide guidance in this respect. A document from the Holy See is also applicable and spells out significant principles: *New Charter for Health Care Workers*.⁸² The agreement is to assure that ethical and religious directives will be observed

⁸⁰ An unsigned and unpublished document was sent to the USCCB by the CDF, dated 17 February 2014 (Prot. No. 180/95 - 45730). Entitled “Some principles for collaboration with non-Catholic entities in the provision of healthcare services,” the document governs many of these shared operating agreements.

⁸¹ For a commentary of the ERDs as they existed at the time, see Orville N. GRIESE, *Catholic Identity in Health Care: Principles and Practice*, Boston, Pope John Center, 1987, 537.

⁸² See PONTIFICAL COUNCIL FOR PASTORAL ASSISTANCE TO HEALTH CARE WORKERS, *New Charter for Health Care Workers*, English edition, Philadelphia, The National Catholic Bioethics Center, 2017.

in each activity of the healthcare facilities. Any deviation from them would violate essential undertakings of the agreement.

For instance, in the United States, these directives are generally found in the ERDs issued by the United States Conference of Catholic Bishops and are applied in each diocese by the diocesan bishop, who remains the interpreter of the various norms and sees to their proper application. Statutes of ministerial juridic persons should include in their statement of purpose that the ERDs (or similar documents in other countries) are observed and that they are subject to the diocesan bishop. Thus, a Catholic hospital operating in Canada would not be subject to laws applicable only in the United States, although similar ones might well be in effect in the country where it carries out its ministry.⁸³

As to the rules governing the sponsoring of works by religious institutes, if the same congregation sponsors activities in many countries, then, in addition to the applicable ethical directives, its proper law for administrative matters would apply equally to all members, regardless of where the work is being carried out. Thus, canon law is not one for all, nor is it uniform. Much depends on the persons involved and on where they are carrying out their mission.

In addition to being governed by canon law, health care institutions are also subject to applicable federal, state, and local laws. A clear statement within the agreement is essential in determining which law is applicable in a given situation. Otherwise, we risk taking something that is appropriate in one set of circumstances and applying it literally to another on the mistaken presumption that canon law requires it. When it comes to civil law documents, we risk simply transcribing what was considered to be canon law for one institution into the operating principles governing another institution.⁸⁴

“Reserved powers” must be clear and well-defined in any sponsorship agreement. In this way, the Catholic identity and governance control is explicitly determined for the sponsored entity, and it is subject to applicable provisions of the *Code of Canon Law*. It is helpful for the petitioner to recognize the powers of the Holy See over its work, as well as those pertaining to the diocesan bishop and the major superior in matters relating to the

⁸³ For instance, in Canada, see CATHOLIC HEALTH ALLIANCE OF CANADA, *Health Ethics Guide*, 3rd ed., Ottawa, 2012.

⁸⁴ For instance, see *St. Vincent Infirmary Medical Center v. Director of Labor*, Court of Appeals of Arkansas, 31 October 1990 (797 S.W.2d 460, 32 Ark. A 156, 32 Ark. A 71). “Evidence indicated that although hospital provided health care, it was operated primarily to carry out religious mission and would not have continued to operate but for religious motivation and purpose.”

administration of Church property, particularly when it comes to the alienation of stable patrimony.⁸⁵ The *corporate control*⁸⁶ of the activity means that the sponsoring entity has the right to have a say before certain corporate decisions are taken. The reservation usually refers to the canonical stewards of the juridic person, who are to comply with the provisions of canon law, even though technically the civil corporation could operate independently of such control.⁸⁷ In discussing reserved powers, it is important to distinguish between powers reserved to the religious institute when the apostolate has simply been incorporated separately, and those powers reserved to the members when the apostolate becomes a new public juridic person. The system of “reserved powers” allows the Church to operate on a canonical basis; otherwise it would operate exclusively from a civil law perspective.⁸⁸

When entering into cooperative agreements, the works should have some type of canonical juridic personality distinct, if possible, from that of the sponsoring institute(s), thus allowing for separate accounts. Provisions should be in place to ensure that the intentions of donors are protected and respected (c. 1267 §3). If these intentions cannot be respected in a new cooperative venture, the goods must be returned to the donors or their successors, unless other appropriate arrangements are made. The temporal goods belonging to the sponsoring institute and those belonging to distinct juridic persons must be clearly distinguished. It must also be determined within these agreements, if the work is to remain “Catholic,” whether certain decisions are to be reserved to one or both of the sponsoring authorities (special

⁸⁵ Bernard C. HUGER explains that “reserved powers” must be clearly defined in sponsoring documents. He recalls an example when Saint Louis University proposed to sell Saint Louis University Hospital to Tenet Health System Hospitals without permission of the Holy See. The Holy See, through the Prefect of the Congregation for Catholic Education and the Prefect for the Congregation for Institutes of Consecrated Life and for Societies of Apostolic Life, in early 1998, stated that the authorization of the Holy See was necessary for the sale of Saint Louis University Hospital. This was because the Province of the Jesuits had not alienated the university, which remained subject to the requirements of canon law and the authority of the Jesuits. The University cannot justify that it was an entity subject neither to Church control nor to the Jesuits. Each Catholic institution which is sponsored by a public juridic person within the Church is a part of the sponsoring juridic person and is subject to canon law. HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation,” 19-26.

⁸⁶ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-related Corporations*, 307.

⁸⁷ The sponsoring religious institute must have sufficient control over the sponsored entity so that it can exercise its responsibilities as prescribed by canon law. HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation,” 19-26.

⁸⁸ See MURPHY, *The Governance of Church Institutions and Protection of Catholic Identity*, 205-215.

reserved powers). In other words, any “non-negotiable” items should be outlined before considering new arrangements. Among such are the observance of the principles of Catholic doctrine and moral practice, respecting the rights of others, establishing some form of communion with the diocesan bishop and providing for quality control relating to the use of the title “Catholic.”

In respect of other interested parties, it should be determined whether civil law prescriptions will be observed (e.g., antitrust statutes, zoning regulations). Appropriate arrangements with funding agencies should be in place to determine whether they can continue funding under the new arrangements.

When referring the matter to the Holy See for authorization of a new canonical status, the documentation should include the decisions of each major superior and council involved, as well as the opinion of the diocesan bishop. Obviously, the partnership agreement itself would be part of the package. If necessary, appropriate civil recognition (such as a new corporation) should be obtained.

It would also be helpful to arrange beforehand the eventual steps to be taken to dissolve the partnership, to avoid undue hardship and further misunderstanding if things do not work out successfully. Such arrangements should provide for the distribution of assets and liabilities and, if possible, for the continuation of the apostolic work.

In agreements with non-Catholic parties, the diocesan bishop would have special input on issues of cooperation, potential scandal, and the like. The involvement of competent ethicists and moral theologians would be important at this point. At times such arrangements will fail to materialize, not because of the canon law as such, but rather because of moral and ethical issues. This is why it is important not to wait until the last moment to determine the moral issues involved in cooperation and to seek the opinion of the diocesan bishop. What is allowed in one diocese or in one part of the country is not necessarily allowed in another. Similarly, some governments allow certain types of transactions while others do not.

Another important provision in any sponsorship agreement with non-Catholic parties is the specific affirmation that the facility will continue to be operated as a nonprofit corporation regardless of the governmental body's property interest therein. This is particularly important because, if the governmental body were found to be operating the facility, its actions would be governed by standards applicable to public institutions rather than by those relating to private corporations. For example, a country cannot deny a citizen's constitutional rights; yet, at times, it recognizes abortion as having some form

of constitutional protection. Thus, a state-run healthcare facility might not be able to prohibit abortion, whereas a private nonprofit corporation acting on its own religious principles and those of its members could legally refuse to carry out such procedures.⁸⁹ The ultimate protection of a nonprofit corporation's Catholic identity in the structuring of agreements is the reservation of the right to terminate participation if the facility is required to act contrary to its Catholic conscience. Such an option should be placed in every agreement.

6 — *Essential Role of the Diocesan Bishop*

In accordance with canon 394 §1, the bishop is to foster various forms of the apostolate in the diocese and is to take care that all the works of the apostolate are coordinated under his direction. The Christian faithful, even in their own manner of acting, are always obliged to maintain communion with the Church (c. 209 §1).⁹⁰ To understand the essential role of the diocesan bishop, we must recall that, in the past, many of the apostolic activities undertaken in a diocese were the sole domain of religious institutes. Invited and encouraged by the diocesan bishop to establish a religious house, the religious carried out their apostolic work with little or no involvement of the part of the diocesan bishop. Except for those areas calling for his vigilance, the religious institutes and its members were free to determine what was in the best interest of their particular apostolate. However, given the Vatican II teaching on the bishop's responsibility in directing the apostolate in his diocese (*CD*, 17), coupled with the decline in religious vocations, aging members and massive changes occurring in health care, the diocesan bishop is being called upon today to act in a more direct manner to safeguard and promote the catholicity of the healthcare apostolate. Currently, sound relationships between the diocesan bishop and the religious institutes in his diocese usually are the result of mutual consultation (c. 678 §3), leading to a strong spirit of communion. Both the bishop and the superiors have their respective responsibilities. Good working relations between them foster cooperation that leads to the strengthening of the Church (c. 680).⁹¹

With new models of sponsorship and governance evolving, the diocesan bishop is at the center of promoting and maintaining the Catholic identity of

⁸⁹ Doe v. CHARLESTON, *Area Medical Center*, 529 F.2d 638 (4th Cir. 1975).

⁹⁰ See MORRISEY, "New PJP Model," 69.

⁹¹ Sharon HOLLAND et al., "Ministerial Juridic Persons and Their Communion with Diocesan Bishops," in *Health Progress*, 97 (2016), no. 6, 68 (=HOLLAND et al., "Ministerial Juridic Persons and Their Communion with Diocesan Bishops").

the healthcare facilities. Especially in terms of the evolving model based on public juridic person status, the role of the diocesan bishop is particularly crucial. At times, it is he who grants juridical personality to the healthcare system or group in his diocese, keeps vigilance over it and receives the annual report of the juridic person (c. 1276); this is the case with juridic persons of diocesan right. He is also to be involved in a number of transactions relating to the alienation of stable patrimony (c. 1291). He determines the Catholicity of a work or institution, watches to see that temporal goods are being used for intended purposes, and supervises the execution of wills and bequests made to the public juridic person. He may even sit on the board of directors of a healthcare facility or system.⁹²

Currently, the diocesan bishop has the responsibility of ensuring that the healthcare apostolate becomes an integral part of the diocesan mission. If he does not do it himself, his duty would be to delegate a qualified person to represent him in healthcare matters pertaining to this apostolate. The diocesan bishop is also responsible for applying the applicable health ethics guide in his diocese. As changes continue to occur in the delivery of health care, his role in the preservation of the character, mission, values and philosophy of the apostolate remains vital to its future identity. However, if a given policy exists in one diocese where a system is exercising sponsorship, this does not necessarily mean that it applies in all the dioceses where it carries out its mission. It can follow that a diocesan bishop could remove “Catholic” identity from a hospital because he judges that its activities are not in conformity with Church teaching and practice.⁹³

When apostolic activities are carried out by lay persons, the diocesan bishop could appoint a chaplain for them (c. 565). This might become complicated when there is an interfaith pastoral care department. In the exercise of their ministry, chaplains belonging to other churches or ecclesial communities would not be subject to the diocesan bishop but rather to their own religious authorities, as well as to the directors of the institution who establish its mission and values and oversee its operations. Although the 1983 *Code of Canon Law* identifies chaplains as priests, many deacons and lay persons are entrusted with the day-to-day responsibilities relating to the office of chaplain.⁹⁴

⁹² MCGOWAN, *The Canonical Status of Catholic Health Care*, 176.

⁹³ See, for instance, Thomas J. OLMSTEAD, “Phoenix Hospital No Longer Considered Catholic,” in *Origins*, 40 (2010-2011), 505-507.

⁹⁴ HOLLAND et al., “Ministerial Juridic Persons and Their Communion with Diocesan Bishops,” 69-70.

When works are sponsored by a system, it is appropriate for the diocesan bishop to be kept informed of the progress of the work, of difficulties and of challenges for the future. Particularly in a period of revision and restructuring, this is an excellent time to establish strong relations with the bishops or their healthcare delegates. Any progress, when different entities are involved, calls for continued dialogue, consultation and hard work. The Church now has available an untapped wealth to be found in so many of its members who resolutely have taken the path of living their baptismal commitment in unforeseen ways. We have to learn to trust them, their judgment and their practical experience. In this way, the Church will flourish, and Christ's saving message can be made more readily available to all.

7 — Statutes and Bylaws Governing the New Ministerial Juridical Persons

The Catholic healthcare ministry as a part of the apostolate's corporate structure should have its own statutes and bylaws defining its purpose, constitution, government, and methods of operation (see c. 94 §1).⁹⁵ Thus, the purpose of Catholic healthcare ministry is to embody the healing mission of Jesus through the ownership⁹⁶ or sponsorship of health facilities and the offering of programs and services consistent with the teaching and laws of the Church and in adherence to any applicable ethics guide.⁹⁷

The governance of ecclesiastical goods must be directed exclusively to the religious and charitable ends of the Church. An understanding of this is important not only for the drafting of statutes and bylaws for a juridic person, but also for its actual governance, management, and operation. Under this arrangement, a public juridic person—usually represented by a board—exercises a sponsored organization's reserved powers, while another board—the board of trustees—exercises the organization's ordinary administrative responsibilities.⁹⁸ The board of directors, as provided in the bylaws, operates in accordance with the moral teaching, discipline and laws of the Church,

⁹⁵ Bylaws, in the common law system, are the secular equivalent of canonical statutes and bylaws.

⁹⁶ One of the clear distinctions between ownership and sponsorship concerns an organization's administration. Owners may or may not be involved in administration. Although not involved in operations, sponsors are involved in certain aspects of administration, although the extent of the involvement may vary. CONLIN, "Sponsorship at the Crossroads," 21.

⁹⁷ See statutes of The Catholic Health Sponsors of Ontario, in HITE, *A Primer on Public and Private Juridic Persons*, 25.

⁹⁸ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-related Corporations*, 213.

with special attention paid to those most in need, the common good, justice, dignity of the person and reverence for life. In accordance with the CHA booklet entitled *The Search for Identity: Canonical Sponsorship of Catholic Health Care*, in the statutes sponsors typically reserve for themselves the right: (1) to establish the philosophy according to which the corporation operates; (2) to amend the corporate charter and bylaws; (3) to appoint or to approve the appointment of the board of trustees; (4) to lease, sell, or encumber corporate real estate in excess of the approved sum; and (5) to merge or dissolve the corporation.⁹⁹ Canonical control must be clearly manifested in at least some of the reserved powers if sponsorship is to be understood as canonical ownership.

Governance in the context of sponsorship is not a static concept involving control but rather a continuum of control, with some degree of influence as its purpose. The provisions of canon law are to be observed especially in regard to financial transactions (c. 1254 §2) and to the charism of the religious sponsor.¹⁰⁰ Any changes and amendments in statutes require approval from the competent ecclesiastical authority, and his permission is also required to sell, alienate or carry out transactions which can worsen the patrimonial condition of the juridic person (c. 1295). Administrators of MPJs are bound by their office to present an annual report to the local ordinary (c. 1287 §1) or to the Holy See, giving evidence that the integrity of faith and morals is preserved and that the use of the temporal goods and the apostolic activity of the Catholic healthcare ministry are in accordance with its purposes.¹⁰¹

Both statutes and bylaws should assure that the healthcare corporation will operate in a manner consistent with the applicable ethics guide.¹⁰² In addition, the religious mission statement should explain that the operation of the institution is consistent with the law and tradition of the Church and the charism of the sponsor.¹⁰³

The statutes are to assure that the sponsor will either select individuals for the institutional boards or have some say over their appointment. In this way,

⁹⁹ CHA, *The Search for Identity*, 81.

¹⁰⁰ In this regard, see CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, *Economy at the Service of the Charism and Mission*, Vatican City, 2018, especially 83-130.

¹⁰¹ See MORRISEY, "New PJP Model," 70.

¹⁰² See THE CATHOLIC HEALTH ALLIANCE OF CANADA, *Health Ethics Guide*, Ottawa, 2012.

¹⁰³ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-related Corporations*, 228. For further discussion on the lay faithful who can carry out the charism of the founding institute, see Jean-Paul DURAND, "Perpétuer les institutions sanitaires, sociales et médico-sociales fondées et transférées par des instituts religieux," in *Studia canonica*, 41 (2007), 173-198.

there will be a line of accountability between the board and the sponsor. This represents a mutual relationship that calls for the board to report to the sponsor on its efforts to ensure that the institution operates in a manner consistent with the teachings of the Catholic Church. The relationship also entails a commitment on the part of the sponsor to work with the institution to enable it to carry out its work as an expression of the Church's ministry. The statutes should provide for general meetings of members in addition to the annual meeting which will be called by the board of directors or the chairperson. The annual meeting of the members should review the statutes regularly and, where necessary, have them updated.¹⁰⁴

Another element found in canonical statutes concerns the suppression or dissolution of the ministry. For example, pontifical juridic persons may be suppressed by the Holy See for failure to act in accordance with their statutes. Upon the suppression or extinction of the ministry, its temporal goods, patrimonial rights and obligations and those of the corresponding civilly incorporated Catholic health corporation(s) should be allocated as determined by the members, with due regard for the will of the founders or donors, and for the applicable prescriptions of the civil law.¹⁰⁵

8 — Challenges for Maintaining Catholic Identity in Sponsored Works

Catholic health care is currently in the process of being transformed and reshaped. It faces many challenges regarding its Catholic identity and the numerous opportunities concerning the future of sponsorship. Some thirty years ago, Catholic health care changed from operating through free-standing facilities to systems sponsored by one or more religious institutes, as well as to diocesan multi-institute sponsored systems looking to provide large scale or even total lay control.¹⁰⁶ Until the 1990s, most Catholic healthcare facilities were operated by institutes of men or women religious; today they bear witness to the transition from religious institutes to lay groups. Thus, the great canonical challenge and question is: who will be the next generation of Catholic healthcare owners? How will the eventual ownership change be managed?¹⁰⁷ Undoubtedly, secularized society will make it more difficult to

¹⁰⁴ CHCO, *Working Together*, 3.

¹⁰⁵ See the statutes of The Catholic Health Sponsors of Ontario in HITE, *A Primer on Public and Private Juridic Persons*, 27.

¹⁰⁶ *Ibid.*, 3.

¹⁰⁷ CONLIN, "Sponsorship at the Crossroads," 23.

continue various apostolic ministries. One result of this reshaping could well be the loss of the sense of Catholic identity. This can affect the relationship of moral teachings regarding certain medical procedures and ethical integrity in decision-making. Users of Catholic healthcare facilities should therefore be made aware of the quality of services to be provided. A study conducted by A.J. LeBlanc and R.H. Hurley, on the subject of stewardship of resources, social justice, and compassionate care, showed that Catholic healthcare facilities revealed few significant differences in their stewardship of resources. However, as for social justice, they provided far greater access than investor-owned ones. Finally, Catholic hospitals provided more compassionate care services than both investor-owned and other non-profit organizations.¹⁰⁸

Another challenge facing Catholic healthcare organizations is collaboration with other entities. These days, we witness the formation of business relations between non-profit and for-profit oriented institutions. Challenges in respect of Catholic identity lie in both areas. Whilst collaboration with the government has been a standard practice for Catholic apostolic activities, changes in culture, law and policy can open new doors for choice and opportunity.¹⁰⁹ The fact of profit-oriented entities entering into such collaboration makes it necessary to take account of social justice to include Catholic independence and the ethos of Catholic ministry. The road ahead, in the light of such new challenges on the basic ministries of the Church, requires creative and disciplined choices by sponsors, boards, professionals and the wider ecclesial community. Catholic apostolic ministry is a valuable contribution to the meaning and continuation of faith in this complex society; therefore, it deserves protection and support.¹¹⁰

Problems in collaborative arrangements may vary, depending on whether or not the prospective partner professes the Catholic faith. Although it may prove easy in theory for Catholic institutions to consider joint ventures with others, it may prove somewhat difficult in practice, particularly when the two organizations are the only ones in the geographical area. Past history, arising from competition and differences in tradition, may prevent full cooperation. Attempts to form joint ventures or affiliations with non-Catholic organizations raise other issues, particularly in regard to moral issues and certain procedures that are not considered moral by the Church, including abortion

¹⁰⁸ Kenneth R. WHITE and James W. BEGUN, "How Does Catholic Hospital Sponsorship Affect Services Provided?" in *Inquiry*, (1998/1999), no. 35, 398-407.

¹⁰⁹ Cf. Mary KELLY, "A Collaborative Formation Program for Sponsors," in *Health Progress*, 88 (2007), no. 1, 16-21.

¹¹⁰ HEHIR, "Catholic Identity Then and Now," 7.

and euthanasia. The ground in this area is shifting, and what may have appeared acceptable yesterday may become questionable today. Another issue is the matter of dealing with insurance providers around the moral norms. This is the reason why many Catholic healthcare providers have sought to establish links with non-Catholic institutions that can perform the procedures that insurance companies insist must be offered.¹¹¹

One of the crucial challenges in healthcare ministry is financial pressure. In particular, it may be noted in mergers and acquisitions by the distinctive identities of the ecclesiastical institutions. Managed care contracts add pressure to the financial bottom line, threatening uncompensated or poorly compensated services. These pressures are particularly acute for large established institutions, such as Catholic hospitals. Many dioceses have developed a formula stating that the purchasing institution must retain the Catholic identity of the work for five years or longer. Withdrawal prior to this period deems it to remit the remainder to the diocese or other donors, and this is determined on a pro rata basis.¹¹²

A significant challenge is that of the provision of training for sponsorship leaders who should be suitably prepared to perform their tasks. They should also be made aware of developments in moral and ethical teachings so as to exercise responsible stewardship over the temporal goods entrusted to their care. They should be particularly careful when considering proposed new mergers, amalgamations, joint ventures, closing down and so forth.

Sponsorship is not something focused on ownership and property issues. Rather, the focus must be on mission. Yet those involved are becoming increasingly distanced from the actual mission, which is carried out by others. Today, Church leaders seem to be expressing more concern with the formation of board members¹¹³ than with addressing preparation for sponsorship responsibilities. The term “sponsorship” seems to be losing clarity from the perspective of the history of its previous application; for this reason, the vocabulary used might have to be adjusted along the way. Although the term “sponsorship” is not alarming, it begs the question of whether it conveys its true meaning in the light of what is involved today.

¹¹¹ CHA, *The Search for Identity*, 45.

¹¹² Francis G. MORRISEY, “Acquiring Temporal Goods for the Church’s Mission,” in *The Jurist*, 56 (1996), 597.

¹¹³ The formation of lay sponsors and leadership today plays a critical role in the future of the Catholic health care ministry. See Robert W. LADENBURGER et al., “Formation of Lay Sponsors,” in *Health Progress*, 89 (2008), no. 2, 43-48 on the formation of the next generation of leadership. Cf. Mary K. GRANT and Patricia VANDENBERG, *Partners in the Between Time: Creating Sponsorship Capacity, Ministry Development Resources*, Michigan City, IN, 2004, 28.

Catholic health care is considering new models whereby its presence and involvement will be maintained and enhanced. Furthermore, acute care facilities such as hospitals are no longer viewed as the only form of involvement of Church groups in the delivery of health care. A shift has been occurring away from active, acute care facilities to new areas covering long-term community health and domiciliary care. New areas of concern are developing, and new frontiers are awaiting to be explored as the Catholic healthcare apostolate stands at the threshold of a new period in its history.¹¹⁴

Contemporary Catholic health care operates in a complex medical, business, political and religious environment. Catholic sponsors are accountable to the Church for carrying out Jesus' healing mission. The healthcare organizations must simultaneously ensure that the sponsors operate in accordance with secular medical and business criteria that are effective, efficient and in compliance with the norms of various regulatory bodies. These two sets of requirements representing different cultural "environments" are likely to conflict on occasion. Yet the mission and identity of Catholic health care must be far more significant than immediate needs of elements of the community. It seems as though social scientists cannot yet predict how these tensions and pressures will change Catholic health care or in the ways in which Catholic health care will continue to be distinctive.¹¹⁵

One thing is certain: the healthcare system is in the process of being transformed and re-shaped in all regions. The same could be said, to a certain degree, of the Church's social services activities and its educational ministry. In the past, many apostolates in the Church were seen as the domain of religious institutes and their members. However, due to external and internal factors, this no longer remains the case. Alternative forms of exercising institutional apostolates are being studied and implemented. This is essential if Catholic involvement is to remain a vital and viable component of the various social systems. Changes in the way Catholic ministry is perceived and carried out dictate a need for new structures to enhance its mission and purpose.¹¹⁶ Serious consideration must be given to these new structures to guarantee that the Catholic identity of the care institution remains vibrant and relevant in the future.

¹¹⁴ MOLLISON and KELLY, "Journey into Sponsorship's Future," 50-53.

¹¹⁵ Clarke E. COCHRAN and Kenneth R. WHITE, "Does Catholic Sponsorship Matter?" in *Health Progress*, 83 (2002), no. 1, 16.

¹¹⁶ Cf. David J. NYGREN, "Effective Governance in Complex Systems," in *Health Progress*, 82 (2001), no. 4, 41-45.

Conclusion

The points explored in this study are by no means conclusive. Because of the great differences from country to country, the legal and practical aspects raised in it are not all-encompassing. Nevertheless, they provide indications of the ways in which an evolving situation is being addressed.

In regard to the evolution of sponsorship, it is evident that the process is still underway. The delivery of health care is continually being transformed and reshaped. Catholic health care organizations, finding themselves within this evolving context, are constantly seeking how best to secure their future in the light of current legislation and the evolution of sponsorship practices. Since the Catholic Church is the largest provider of healthcare services in the world, it is essential that various situations be taken into account. One size cannot possibly fit all hospitals, clinics, dispensaries, and other related establishments.¹¹⁷

The analysis of the present situation shows that we have probably not yet discovered the most suitable sponsorship model by which to resolve all difficulties relating to the mission, vision and identity of the apostolic activity. Indeed, such might never be possible. However, the Church's involvement in sponsorship is vital for the continuation of Catholic health care, a care that promotes and sustains Christ's healing ministry to people in need. To deprive people of this ministry would have very serious negative effects on the well-being of humanity, particularly in those countries where other health-care services are not readily available. It is important to bear in mind that changes in the perception and realization of Catholic ministry call for the need of new structures to enhance its purpose and mission. Ultimate success in this endeavor is not assured, but this does not mean that we can simply avoid any effort to increase its effectiveness.

¹¹⁷ While most of the comments in this article refer directly to Catholic healthcare institutions, in relation to Catholic Universities and educational institutions, see M.P. SEURKAMP, "Catholic Universities and their Founding Congregations. Navigating the Waters of Sponsorship", Washington, DC, Association of Catholic Colleges and Universities, 2018, 13 p.

IMPLICIT RIGHTS OF THE FAITHFUL IN BOOK III OF THE CODE OF CANON LAW

SARATH CHANDRA SAGAR MADDINENI, C.SS.R.

SUMMARY — The A. develops a theory of implicit rights of the faithful in canon law and then applies it to the canons of Book III of the *CIC*. While explicit rights are indicated by the word *ius* or a synonym of same, an implicit right has no explicit terminology indicating a right. Such rights may be implied in the legal obligations of office holders and ministers: that they are obliged by law to do something for the benefit of the faithful implies a concomitant right of the faithful that it be done. Other requirements of the law may also give rise to implicit rights. These can only be known by a careful study and interpretation of the law considered in text and context. There are also certain Latin grammatical expressions commonly used in canon law for obligations or other requirements of law, and frequently these are indicators of an implied right.

RÉSUMÉ — L'A. développe une théorie de droits implicites des fidèles en droit canonique et l'applique ensuite aux canons du Livre III du *CIC*. Alors que les droits explicites sont indiqués par le mot *ius* ou un synonyme de celui-ci, un droit implicite n'a pas de terminologie distincte indiquant un droit. Ces droits peuvent être implicites dans les obligations légales des ministres et de tous ceux qui détiennent un office ecclésiastique : être légalement obligés de faire quelque chose au profit des fidèles implique un droit concomitant de le faire. D'autres exigences de la loi peuvent également donner lieu à des droits implicites. Celles-ci ne peuvent être connues que par une étude et une interprétation minutieuses de la loi considérée dans son texte et dans son contexte. Il existe également certaines expressions grammaticales latines couramment utilisées dans le droit canonique pour désigner des obligations ou d'autres exigences du droit, qui sont souvent indicateurs d'un droit implicite.

Introduction

In my experience as a priest ministering in India and Africa, I realized that the majority of Christian faithful do not have much, if any, knowledge of canon law.¹ At times, even the pastors who guide these Christians do not really know the richness of the Code, and they seem scarcely aware of the existence of the canonical rights enjoyed by those in their pastoral care. The reformed 1983 *Code of Canon Law*² went into effect more than three decades ago, yet it is not fully utilized or even discovered by many. The rights of the faithful can only be realized and appreciated when the faithful know what rights they have. In order to vindicate one's rights, one needs to know them. This is a considerable challenge, however, since many rights in the Code are implicit, that is, not explicitly stated to be rights, so that they may not even be recognized as rights.³

It is sometimes recognized by canonical authors that, whenever an office holder or another has a legal obligation to fulfill on behalf of the community, the faithful have a corresponding right that this duty be fulfilled. This is an implicit right. Implicit means that no right is explicitly mentioned, but the right is implied and may be inferred. The canons that impose an obligation are not, however, the only ones that contain implicit rights, as this study will demonstrate. Indeed, we shall see below in the first part of this study that

¹ This article is based in part on the author's doctoral thesis, *Explicit and Implicit Rights Common to All the Faithful in the Code of Canon Law*, JCD dissertation, Ottawa, Saint Paul University, 2018.

² *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus fontium, annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999. All references to the canons of the 1983 Code will be styled "c." for canon and "cc." for canons, followed by the canon number(s).

³ The word for "right" in Latin is *ius*, but the word has more than one meaning. Wojciech Kowal nicely summarizes the three meanings of *ius* as the word is used in legal systems, including canon law. (1) The first meaning is that of an absolute objective right (*ius/right*)—the object of justice, what is due, what is just. (2) The second is a causal or normative objective right (*ius/law*)—the norm in view of which the object of justice, that which is due, is determined and measured, the *iussum* (what was decided). It is the corpus which says what the objective right is. (3) The third meaning of *ius* is that of a subjective right (*ius/right*)—the power or inviolable moral or legal faculty of doing, possessing, omitting or exacting something. It is the third meaning of *ius* that is the subject of this article. See W. KOWAL, *Philosophy of Law, Canon Law Class Notes*, Ottawa, Saint Paul University, 2018, 18.

there are implicit rights in some canons in the very sections of the Code that deal explicitly with rights and obligations.

When canonists think about rights in canon law, and when authors write about canonical rights, their attention is mainly directed to one or more of the sections of the Code that explicitly treat rights: those on the obligations and rights of all the faithful in general (cc. 208-223), of the lay faithful (cc. 224-231), of clerics (cc. 273-289), and of religious institutes and their members (cc. 662-672). Attention is also given to the obligations and rights of parents, which are mentioned in a number of the canons (cc. 226, §2; 747; 774, §2; 793, §1; 796, §1; 796, §2; 798; 1136). However, it has been our observation that rights run throughout the Code in all seven books as well as in other sources of canon law, including the liturgical laws and, of course, the *Code of Canons of the Eastern Churches*.⁴ These rights are sometimes explicit, even if some other terminology besides “right” is used in the law. For the most part, however, these rights are implicit and only knowable as rights by fully grasping the meaning of the law.

The purpose of this study, which is in three parts, is to develop a methodology for identifying implicit rights in canon law and then to apply that methodology to discover the implicit rights in the canons of the third book of the Code, entitled *De Ecclesiae munere docendi*. The first part distinguishes explicit and implicit rights in the four sections of the Code devoted to the rights of (1) all the faithful, (2) the lay faithful, (3) clerics, and (4) members of religious institutes. The second part identifies several categories of implicit rights in canon law. The third part details, by way of illustration, the explicit and implicit rights found in Book III of the Latin Code on the teaching office of the Church.

Our study is only concerned with *express* rights, be they explicit or implicit in the wording of the law, but there are also some *tacit* rights in canon law, that is, rights which cannot be identified from the text or immediate context of the law but can only be known after a profound study of the manifold contexts of the law. For instance, as we shall see, James Conn maintains that the faithful have a right to know the names of the professors who have the *mandatum* to teach theological disciplines (c. 812). No such right is discernible from the text or context of the canon, not even implicitly, but Conn offers good arguments in favour of the existence of the right.

⁴ *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus*, Typis Polyglottis Vaticanis, 1990, English translation *Code of Canons of the Eastern Churches, Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, CLSA, 2001 (=CCEO).

1 — *Distinguishing Explicit and Implicit Rights*

The two Codes and other sources of canon law use various expressions to indicate *explicitly* a right. The word *ius* indicates a strict right except when the word is used in its objective sense, that is, when it refers to a law or another objective norm (custom, general administrative norm, statute). The law uses expressions like *ius est*, *ius habet*, *iure gaudet*, etc. It also applies equivalent terminology to state explicitly a right, such as *fas est*, *integrum est*, *libertas est*, *potest/possunt*, etc. A special comment needs to be said about *potest/possunt*. If the Latin word should be translated by the English word “may,” it indicates a right. When the legislator says the faithful *may* do such and such, he accords them the right to do so. The same word *potest*, however, should be translated by the English word “can” when indicating a capability or power to do something. If, for instance, the legislator says all the faithful can be deputed for some ecclesial service, it means they are radically capable of exercising that service, not that they have the right to do it; for they must first be deputed. Thus, the same word in Latin may indicate a right, or it may not, depending on the meaning of the law.

Laws that contain *implicit* rights have no comparable words that explicitly state a right. As noted, four sections of the Code of Canon Law treat rights in both text and context, those on the rights of all the faithful, of the laity, of clergy, and of religious. For the most part, the canons in these sections explicitly state the rights of persons. In a sizeable number of these canons, however, a right is only implicitly expressed. We shall now briefly analyze the canons of these four sections of the Code to identify and distinguish explicit and implicit rights. By so doing, we believe that a proper methodology will emerge that will enable the canonist to identify implicit rights elsewhere in canon law when the law in question lacks the specific context of “obligations and rights.”

1.1 — Rights of All the faithful

Part I of Book II of the Code, in Title I, treats basic rights and obligations that are common to all the baptized faithful. In addition to the obligations, this Title names sixteen distinct rights. Thirteen of these are explicitly stated. Ten of these thirteen use the exact word “right” in different ways: *habent ius* or *ius habent* (cc. 211, 215, 216, 217), *ius est* (cc. 213, 214, 221, §2, 221, §3), *iure gaudent* (c. 219), or simply *ius* (c. 220). Three canons use an expression other than *ius* which, nevertheless, explicitly indicate a right in that the legislator could have used *ius* in their stead and the meaning would

be the same. One of these expressions is *integrum est* (cc. 212, §2, 215), as in *integrum est christifidelibus*. This may be translated as “the Christian faithful are at liberty,” or “the Christian faithful are free.” If the law says the faithful are at liberty or free to do something, it means that they have the right to do it. The other expression in this Title that explicitly indicates a right is *libertate fruuntur* (c. 218), which may be translated as “have the liberty” or “enjoy the freedom.” Again, if the law says that the faithful are at liberty or enjoy the freedom to do something, the legislator is explicitly giving them the right to do it.

Three of the canons in this Title on rights and obligations have rights that are only indicated implicitly. Canon 220 begins by saying, “no one is permitted to harm illegitimately the good reputation which a person possesses.” The canon is worded negatively; it is a blanket prohibition against every illegitimate violation of a person’s good reputation. Implicit in this prohibition, however, is the affirmation of the positive right of the Christian faithful to the protection of their good name.

Another implicit right is seen in c. 221, §1: “The Christian faithful have the competence (*Christifideles competit*) to vindicate legitimately their rights” The word *competit* may indicate just a capability or competence to do something, but here a right is implied. The canon does not explicitly state that this competence is a right, but it is implicit both from the context of Title I and from the text itself. In saying that the faithful have the competence to vindicate their rights, the canon implies that they have the right to do so.

A third instance in this Title of an implicit right is seen in c. 208: “From their rebirth in Christ, there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one’s own condition and function.” Clearly, no right is explicitly stated in this canon. However, a right is implied in saying that “there exists among all the Christian faithful a true equality regarding dignity and action.” Implicit in this affirmation of a *vera aequalitas* common to all the faithful is their right to equal treatment under the law, always “according to each one’s own condition and function.

1.2 — Rights of the Lay Faithful

Part I, Title II of Book II of the Code treats the Obligations and Rights of the Lay Christian Faithful (cc. 224-231). In addition to the obligations, this Title names fourteen distinct rights. Seven of these are explicitly stated by using the exact word “right” in different ways: *iure gaudent* (cc. 225, §1, 226, §2, 229, §1, 229, §2), *ius est* (c. 227), *ius habet* and *ius competit* (both

in c. 231, §2). The other seven rights in this Title are only implicit. None of these is a strict right as such, but rather they are capabilities that imply a right. For example, c. 228, §1 begins by saying, “lay persons who are found suitable are qualified (*sunt habiles*) to be admitted by the sacred pastors to those ecclesiastical offices and functions which they are able to exercise according to the precepts of the law.” To be qualified for an office or other task does not mean that one has a right to it. The implicit right, rather, is for fair consideration, all things being equal. If a lay person is qualified for a certain office or function, he or she may not lawfully be passed over in favour of a cleric solely because of being lay.⁵ That would be blatant clericalism and contrary to the right of this canon. There would have to be some just reason to prefer the cleric instead of the lay person if both are equally competent. The other implied rights like this one are in cc. 228, §§2, 3 (twice: *habiles sunt*); 230, §1 (*assumi possunt*); 230, §2 (*implere possunt*); 230, §2 (*fungi possunt*); and 230, §3 (*possunt supplere*).

1.3 — Rights of Clerics

Part I, Title III of Book II of the Code treats the Obligations and Rights of Clergy (cc. 273-289). In addition to the obligations, this Title names six rights but only once uses the word “right” (*ius est* in c. 278, §1). In two instances, this section of the Code addresses the issue of the remuneration of clerics in general (c. 281, §1) and of married deacons in particular (c. 281, §3). In both instances, the law says that the clerics in question deserve remuneration (*remunerationem merentur*). If the clergy are deserving of remuneration, they have a right to it. Thus, we conclude that this is an explicit right not only from the context but also from the text itself. To say one is deserving of remuneration is simply another way of saying one has a right to remuneration.

Canon 283, §2 literally says that clerics are qualified to enjoy (*competit ut gaudeant*) an annual vacation. The CLSA translation renders this as being “entitled to” a vacation, that is, they have a right to it. So, this is another way of explicitly indicating a right.

In the other two canons in question, the rights are implicit. Canon 274, §1 states: “Only clerics can obtain offices for whose exercise the power of orders or the power of ecclesiastical governance is required.” The canon uses the term *obtinere possunt*, that is, it is a capability to obtain such offices. Since lay persons are by divine law excluded from offices requiring the

⁵ Cf., however, c. 274, §1, discussed below.

power of order, the implied right of the canon is that, all things being equal, a cleric has preference over a lay person for an office entailing the exercise of the power of governance.⁶ For example, if there are two equally qualified applicants for the office of judge, one a permanent deacon and the other a lay person, the deacon has the right to be appointed. This is an exception to the general rule discussed above concerning c. 228, §1.

Canon 281, §2 says, “provision must also be made (*item providendum est*) so that [clerics] possess (*gaudeant*) that social assistance which provides for their needs suitably if they suffer from illness, incapacity, or old age.” Here a right is implied in the *obligation* of the ecclesiastical authority to provide the necessary social benefits for the clergy of his jurisdiction.

1.4 — Rights of Members of Religious Institutes

Part III of Book II of the Code, in Title II, treats the Obligations and Rights of Institutes and Their Members (cc. 662-672). Most of the canons in this section fall under obligations. There are no explicit rights, but two of the eleven canons imply rights. Firstly, c. 668, §1 says in part, “Before first profession, members are to cede the administration of their goods to whom-ever they prefer and, unless the constitutions state otherwise, are to make disposition freely for their use and revenue.” This law is an obligation, but two rights are implied, namely, the right of novices to cede the administration of their goods *to whomever they prefer* and, unless the constitutions state otherwise, the right *to make disposition freely* of their use and revenue.

Canon 670 states: “An institute must supply (*debet suppeditare*) the members with all those things which are necessary to achieve the purpose of their vocation, according to the norm of the constitutions.” Again, we see a right implied in an obligation. Since the institute is strictly obliged to supply everything necessary for one’s religious vocation, each member has a strict right to all those things (*omnia*) necessary for their vocation, *ad normam constitutionem*.

Conclusions. This analysis of the sections of the Code which treat rights of all the faithful, the laity, the clergy, and members of religious institutes leads to several conclusions that can be the methodological basis for indentifying implicit rights in canon law. From this exercise, we have seen that the canonical legislator does not restrict himself to using the word *ius* when he wishes to declare or constitute a right in the law. A total of thirty-eight rights are acknowledged in these four sections of the Code. Of these,

⁶ This right, however, in no way excludes lay persons from all offices entailing the exercise of the power of governance (c. 129, §2; cf. e.g. c. 1421, §2).

twenty-four are explicitly stated, eighteen times actually using the word *ius* while in another six instances substituting a different expression that has the same meaning in the context. These other words are *integrum est* (occurring twice), *iusta libertate fruuntur*, *remunerationem merentur* (occurring twice), and *competit ut gaudeant*. So, the first conclusion is that rights in canon law are explicitly recognized not only by using the word *ius* but also by using other terminology which may be substituted for *ius*. If the substituted word or expression may be changed to *ius* with no change in the meaning of the law, the right in question is explicit.

The second conclusion is that rights in canon law may be accorded implicitly, that is, with no word in the law that has a meaning equivalent to *ius*. In these four sections of the Code that explicitly treat rights, the legislator nevertheless declares or accords many of them only implicitly in the wording of the canons without any explicit mention of a right. Of the total of thirty-eight rights in these four sections, fourteen are implicit, that is, 37% of the total. We have seen rights implied in a prohibition, in various obligations, in several competencies and capabilities, and by the divine law in the baptismal dignity of all the faithful. Implicit rights are found throughout the Code as well as other sources of canon law, not just in these four sections explicitly devoted to rights and obligations. We shall see an illustration of this in the third part of this study on the implicit rights in Book III of the Code.

2 — *Implicit Rights*

“Implicit” means that no right is explicitly mentioned, but the right is implied and may be known through a correct interpretation of the law in text and context. Implicit rights typically can be recognized in several ways: rights flowing from the obligations of office holders and ministers, rights based on other requirements of the law, and grammatical indicators of rights. There are also rights implied in some canons without any of these indicators, but these may only be known after fully grasping the meaning of the law and its function in the canonical system.

2.1 — **Rights Flowing from the Obligations of Office Holders and Ministers**

Whenever an office holder or another has a legal obligation to fulfill on behalf of the community, the faithful have a corresponding right that this duty be fulfilled, but this right is implicit. These implicit rights are very

numerous in the Code and other sources of canon law. For instance, with regard to the law on pious wills in Book V, the competent authorities are obliged to fulfill them faithfully. Fidelity to the intention of the donor is a cardinal principle of canon law, and it extends even to the manner of the administration and distribution of the goods to be diligently fulfilled (*diligentissime impleantur*, c. 1300). The faithful thus have the right that their will be fulfilled faithfully upon their death insofar as an ecclesiastical authority is responsible in some way for it.

2.2 — Rights Based on Other Requirements of the Law

Not all implicit rights are based on obligations of office holders and ministers. Many are implied in other requirements of the law. For example, c. 902 accords priests the right to concelebrate the Eucharist “unless the welfare of the Christian faithful requires or suggests otherwise.” This excepting clause is a restriction on the right of priests to concelebrate, and it implies a right of the faithful. The welfare of the faithful is at stake especially at large celebrations with many people and priests present, a concern addressed in a document of the Congregation for Divine Worship and Discipline of the Sacraments.⁷ The welfare of the people cannot be compromised at the cost of a concelebration by numerous priests as would happen, for example, if the assembly’s view of the altar is concealed by the concelebrants standing in the front pews, or Mass is unduly protracted by their reception of Communion. In such situations, pastoral needs require or suggest that there be a limit on the number of concelebrants or that the Mass not be concelebrated. Implicit in this canon, therefore, is the right of the faithful to have their own welfare considered in the planning for concelebrated Masses so that they may have a fitting celebration of the Eucharist as envisioned by the Second Vatican Council and the revised Order of Mass.⁸

2.3 — Grammatical Indicators Implying Strong Rights⁹

Another way of identifying implicit rights is by certain grammatical indicators of strong rights and milder rights. The first category consists of laws with

⁷ See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Guide for Large-Scale Celebrations, 13 June 2014, prot. no. 371/14, in *USCCB Committee on the Liturgy Newsletter*, 52 (March-April 2016), 9-16.

⁸ See J.M. HUELS, Commentary on c. 902, in *CLSA Comm2*, 1098; cf. J. ABBASS., “The Eucharist: A Comparative Study of the Eastern and Latin Codes,” in *SCL*, 7 (2011), 47-84.

⁹ For this treatment, we mainly rely on J.M. HUELS, *Liturgy and Law: Liturgical Law in the System of Roman Catholic Canon Law*, Montreal, Wilson & Lafleur, 2006, 234-236.

forceful verbs and expressions that imply rights. These fall into two kinds. The first is that of canons with strong commands, prohibitions, requirements, or assertions in the present tense indicative mood, in either the active or passive voice. These include words such as *debet*, *tenetur*, *oportet*, *nequit*, *non postest*, *nefas est*, *officium est*, etc. There are numerous canons in the Latin Code with such verbs that imply rights common to all the faithful (Appendix One, no. I A).

The second kind of forceful expression, less common, is the passive periphrastic, which is said to be “the strongest Latin command” translated by the English “must”¹⁰ (Appendix One, no. I B). The passive periphrastic conjugation is composed of the future passive participle in the nominative case and *esse* in the required tense,¹¹ which is always the present tense in canon law (*est*, *sunt*). The passive periphrastic imposes a grave obligation. For example, c. 1722 allows the ordinary at any stage of the penal process to place certain restrictions on someone accused of committing a crime.¹² The canon then adds that, once the reason for them ceases, “all these measures must be revoked.” The legislator admonishes the ordinary with the strongest possible command: *omnia sunt revocanda*.

It stands to reason that, when the legislator uses a strong expression to impose a grave obligation on an office holder or minister, or to establish forcefully another requirement of the law, an equally strong right of the faithful is implied. Such rights are quite specific, and their violation is more clearly recognizable than rights in the next category in which less forceful grammatical expressions are used in the law. It follows that these strong rights, at least theoretically, should be more readily subject to vindication than those implied in canons with milder obligations and requirements.

2.4 — Exhortations and Mild Requirements of the Law Implying Rights

There are an additional two kinds of grammatical expressions that often imply rights in canon law, but these are mild commands in the present

¹⁰ Foreword to the Translation, *Code of Canon Law Latin-English Edition*, Washington, CLSA, 1998, xix.

¹¹ John F. COLLINS, *A Primer of Ecclesiastical Latin*, Washington, D.C., The Catholic University of America Press, 1985, 145.

¹² Can. 1722. Ad scandala praevenienda, ad testium libertatem protegendam et ad iustitiae cursum tutandum, potest Ordinarius, audito promotore iustitiae et citato ipso accusato, in quolibet processus stadio accusatum a sacro ministerio vel ab aliquo officio et munere ecclesiastico arcere, ei imponere vel interdicere commorationem in aliquo loco vel territorio, vel etiam publicam sanctissimae Eucharistiae participationem prohibere; quae omnia, causa cessante, sunt revocanda, eaque ipso iure finem habent, cessante processu poenali.

subjunctive or with the predicate genitive. A very common construction in canon law is the present subjunctive, often called the jussive subjunctive, because it is a form of command, even if mild. In canon law, the present subjunctive frequently is an exhortation directed to an office holder. It is used mostly to highlight the general requirements and goals of the office rather than to lay down specific duties or actions that must be undertaken. It is translated into English as *should*, or *is to*, do such and such (Appendix One, no. II A).

A second, less common grammatical expression which may imply a right is the predicate genitive (Appendix One, no. II B). This Latin construction consists of a noun in the genitive case, plus *est* or *sit* and an infinitive. It can indicate a competency or an obligation. If the latter, a right is implied, but the right is not a strong one. For example, c. 767, §4 says that “it is for the pastor or rector of a church to take care” (*parochi aut ecclesiae rectoris est curare*) that the prescripts on the homily are observed conscientiously. This is clearly an obligation that implies the right of the faithful to have homilies given in accord with the law. However, it is a general obligation, not a specific one as seen in the second paragraph of that same canon, which forcefully requires a homily at all Masses on Sundays and holy days (as discussed below).

2.5 — No Grammatical Indications

Finally, Appendix One has a list of selected canons that imply rights but without any of the above grammatical indicators (no. III). The rights can only be known after studying the canon in text and context and, as may be necessary, consulting canonical commentaries and specialized studies to understand the meaning and import of the canon. For example, c. 107 §1 declares that a person acquires his or her pastor and ordinary through domicile and quasi-domicile. Implicit in this statement is the right of all the *christifideles* to have a parish and a particular Church in which to exercise their ecclesial rights.

2.6 — Vindicating Rights

The vindication of rights by means of a formal or an informal, canonical procedure is a huge topic beyond the scope of this study. Nevertheless, a few observations in this regard are in order. The first is based on the categories of law in Appendix One. The highly imperative, forceful expressions of the law which impose specific requirements, obligations, or prohibitions imply

rights that are equally important, and their violation, whether due to negligence or malice (cf. c. 128), is a serious canonical offence (though in most cases not a crime). In contrast, the rights implied in an exhortation using the present subjunctive or predicate genitive usually follow from general responsibilities, not precise obligations. The faithful, in vindicating their rights, and the canonical advocate in assisting them, need to be aware of this distinction, as the right implied in a law in this latter category is not easily vindicated because of its very lack of specificity.

To illustrate this, we need only take as an example the canon on the liturgical homily. Using the strongest language, c. 767, §2 imposes the obligation to preach the homily. The homily must be given (*homilia habenda est*) at all Masses on Sundays and holy days of obligation that are celebrated with a gathering of people. The canon adds that it cannot be omitted except for a grave cause. Certainly, the habitual neglect of this requirement by one's pastor would be an abuse of the liturgy and the violation of the right of the faithful to have a homily as required by law. If parishioners were to become aware that this is a violation of their right and would then seek the services of a canonist, he or she should advise them to report this neglect to the competent authority and, if the latter fails to rectify the situation or does not reply (cf. c. 57), to take administrative recourse.

On the other hand, it would be more difficult to identify a violation of rights based solely on c. 767, §4, which says that it is for the pastor or rector of a church to take care that the prescripts on the homily are observed conscientiously. This general obligation implies a right but, in case of an alleged violation of the canon, the specific laws that are not being observed would have to be identified before one could assert that this right was not being met.

3 — Rights of the Faithful in Book III of the CIC

The subject of the third part of this study is the rights common to all the faithful in the canons of Book III of the *Code of Canon Law* entitled, *De Ecclesiae munere docendi*. The word for the teaching "office" in Latin is *munus*, which can be translated variously: office, duty, responsibility, task, function, position, etc. All these meanings come into play in the canons of Book III. This third book of the Code is chosen to illustrate the principles discussed in the first two parts of this study but, in fact, any other book could equally have been employed. In other words, the methodology used for identifying rights in Book III, as discussed above, is equally applicable to other

ecclesiastical laws, whether in the Codes or other sources, universal or particular.

Book III is arranged in five Titles. Following several foundational canons of major importance (cc. 747-755), Book III establishes basic canonical discipline for a variety of juridical institutes that are a part of, or closely related to, the *munus docendi*: the ministry of the divine word, especially preaching and catechetical instruction (cc. 756-780); the mission action of the Church (cc. 781-792); Catholic education, especially schools, Catholic universities and other institutes of higher studies, and ecclesiastical universities and faculties (cc. 793-821); instruments of social communication and books in particular (cc. 822-832); and the profession of faith (c. 833).

Canon 17 provides the fundamental rules for the correct interpretation of canon law. “Ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purpose and circumstances of the law, and to the mind of the legislator.” Canon 17, then, is the guidepost for determining whether an ecclesiastical law contains a right. We look first to the text of the law to identify explicit or implicit rights. For the explicit rights, this textual analysis usually suffices, as the right is indicated by the word *ius* or an equivalent expression. For the implicit rights, moreover, we need to understand the meaning and purpose of the law to determine whether a right is implied. Thus, for each canon with an implicit right, the text of the canon will be given followed by a brief explanation of it based on the canonical doctrine in standard commentaries on the Code and in specialized books and articles. These explanations will be helpful, and at times even necessary, in identifying the existence of an implicit right.

Various explicit and implicit rights can be identified in several categories: rights related to the ministry of the divine word, especially the rights to preaching and catechetical formation; rights with respect to Catholic education; and rights with respect to the publication of books by Catholic authors on topics of faith and morals. There are also a few rights in Book III that do not fall into these categories. These are in the introductory canons of Book III and in Title II on the mission action of the Church, as discussed below (section 3.5).

3.1 — Right to Preaching

“The Ministry of the Divine Word” is the heading of Title I of Book III of the Code (cc. 756-780). Canon 761 speaks directly to the various means

that are to be employed in proclaiming Christian teaching.¹³ The canon urges that all available means are to be used in proclaiming the message of Christ. Preaching and catechetical formation are primary; they always hold the first place.¹⁴ This ministry broadly consists of all the Church's means of teaching and evangelizing. In the structure of Book III of the Code, however, it mainly refers to "the Preaching of the Word of God" and "Catechetical Formation," which comprise the two chapters of Title I. Subsequent canons of Book III—on mission action, Catholic education, and the means of social communication—are also part of this ministry, but they are treated in separate titles under their own headings.

Preaching is the proclamation of the good news of salvation. The spiritual purpose of preaching is to arouse a faith response and conversion to the Good News of Christ. The primary concern of the Church's law towards the word of God is that it be preached effectively by the clergy and by legitimately deputed lay preachers.¹⁵ In the chapter on preaching in the Code, the right of the faithful to preaching by ordained ministers is strongly affirmed, mainly implicitly in virtue of the duty of the clergy to preach the word of God. One canon has an explicit right (*ius*) with respect to preaching, but it is a right of bishops, not of all the faithful (which is the subject of this study).¹⁶ A second canon has an explicit right of the faithful, but it uses a term other than *ius*.

¹³ Cf. *CIC*, c. 761. *Varia media ad doctrinam christianam annuntiandam adhibeantur quae praesto sunt, imprimis praedicatio atque catechetica institutio, quae quidem semper principem locum tenent, sed et propositio doctrinae in scholis, in academiis, conferentiis et coadunationibus omnis generis, necnon eiusdem diffusio per declarationes publicas a legitima auctoritate occasione quorundam eventuum factas prelo aliisque instrumentis communicationis socialis.*

¹⁴ In *Evangelii gaudium*, the apostolic exhortation issued in 2013 after the synod on the new evangelization, Pope Francis dedicates the third chapter to the proclamation of the Gospel. Above all, he calls for preachers to take the task seriously by devoting significant time for the duty of preaching. See POPE FRANCIS, *Apostolic Exhortation on the Proclamation of the Gospel in Today's World Evangelii gaudium* (=EG), in AAS, 105 (2013), 1019-1137, English translation FRANCIS, *The Joy of the Gospel Evangelii gaudium: Apostolic Exhortation*, Washington, DC, United States Conference of Catholic Bishops, 2013.

¹⁵ See J.A. CORIDEN, *Commentary on cc. 762-772*, in CLSA *Comm2*, 924.

¹⁶ Cf. *CCEO*, c. 610 §1; *CIC*, c. 763. *Episcopis ius est ubique, non exclusis ecclesiis et oratoriis institutorum religiosorum iuris pontificii, Dei verbum praedicare, nisi Episcopus loci in casibus particularibus expresse renuerit.*

This right of c. 763 does not depend on having an office such as diocesan bishop or auxiliary bishop. The right is obtained *ipso iure* at the moment of episcopal ordination. Presbyters who have offices which are equivalent in law to the diocesan bishop do not have this right. The right is the result of the fact that "ordination as a bishop itself entails a special relationship with the word and the bishop's responsibilities for the entire Church." See J.A. FUENTES, *Commentary on c. 763*, in *Exegetical Comm*, vol. 3/1, 80.

Canon 762 states: "Sacred ministers, among whose principal duties is the proclamation of the gospel of God to all, are to hold the function of preaching in esteem since the people of God are first brought together by the word of the living God, which it is certainly right to require from the mouth of priests."¹⁷ The canon says that the faithful utterly have the right (*omnino fas est*) to require preaching from the mouth of *sacerdotes*, that is, from bishops and presbyters. The Latin word *fas* may be taken as a synonym for *ius* in this and many other instances in canon law, so this is an explicit right.

This clause of the canon inexplicably overlooks deacons, who are *ministri sacri* and who have the faculty to preach by law in accord with c. 764. This omission is probably due to the canon's reliance on conciliar sources which deal with preaching the gospel by bishops (*LG*, no. 25)¹⁸ and by presbyters (*PO*, no. 4);¹⁹ there was no comparable treatment at Vatican II of preaching by deacons. Rather than *sacerdotes*, the legislator should have said *ministri sacri*, which would also be consistent with the main clause of the canon. Although deacons are not included in this clause of c. 763, it is not correct to conclude that the faithful have no right to require preaching from deacons who have the faculty to preach and a pastoral charge that includes preaching. In the first part of the canon referring to "sacred ministers," deacons are certainly included and, like presbyters and bishops, have as a principal duty the proclamation of the gospel. Since preaching is one of the principal duties of deacons, the faithful have an implicit right to preaching by qualified deacons.

No right of the faithful to hear preaching from lay persons is found in the universal law. However, such a right may exist implicitly in particular law or by administrative act (cf. c. 766) when qualified lay persons are deputed

For his part, the *diocesan bishop* has the obligation to preach frequently in person (c. 386, §1), which implies a right of the faithful to have such preaching by their bishop. Cf. J.A. CORIDEN, "The Teaching Ministry of the Diocesan Bishop and Its Collaborative Exercise," in *Jur*, 68 (2008), 382-407; T.J. GREEN, "Rights and Duties of Diocesan Bishops," in *CLSAP*, 45 (1983), 18-36; F.G. THOMAS, "The Bishop in His Teaching Office and Those Who Assist Him," in *StC*, 21 (1987), 229-238

¹⁷ Cf. *CIC*, c. 762. Cum Dei populus primum coadunetur verbo Dei vivi, quod ex ore sacerdotum omnino fas est recipere, munus praedicationis magni habeant sacri ministri, inter quorum praecipua officia sit Evangelium Dei omnibus annuntiare. See FUENTES, Commentary on c. 762, in *Exegetical Comm*, vol. 3/1, 77; see also C. SOLER, "El derecho fundamental a la palabra y los contenidos de la predicación," in *Fidelium Iura*, 2 (1992), 305-331.

¹⁸ See SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November, 1964 (= *LG*), no. 25, in *AAS*, 57 (1965), 29-31, English translation in *FLANNERY*1, 379-381.

¹⁹ See SECOND VATICAN COUNCIL, Decree on the Ministry and Life of Priests *Presbyterorum ordinis*, 7 December, 1965 (= *PO*), no. 4, in *AAS*, 58 (1966), 995-997, English translation in *FLANNERY*1, 868-870.

with the duty of preaching or appointed to an office requiring regular preaching (e.g., c. 517, §2).²⁰

In the remainder of this section, we will be dealing with six canons with implicit rights to preaching. The legislator implicitly acknowledges in these canons that the faithful have the right to hear homilies and other forms of preaching from their ordained ministers.

3.1.1 — *Right to the ministry of the word*

Canon 757. It is proper for presbyters, who are co-workers of the bishops, to proclaim the gospel of God; this duty binds especially pastors and others to whom the care of souls is entrusted with respect to the people committed to them. It is also for deacons to serve the people of God in the ministry of the word in communion with the bishop and his *presbyterium*.²¹

The canon says that it is proper for presbyters to proclaim the gospel of God. Preaching, moreover, is a duty particularly binding (*praesertim hoc officio tenentur*) on pastors and others [presbyters] who serve in pastoral ministry for a community of the faithful entrusted to them. The less forceful predicate genitive expression is used with respect to the ministry of the word exercised by deacons (*diaconorum est inservire*).²² Pastors and other presbyters in charge of a community of the faithful have a strong obligation to exercise the ministry of the word, while deacons have a milder obligation. Thus, the law implicitly grants the faithful a strong right to hear the word of God from presbyters entrusted with the pastoral care of a community and a lesser right with respect to deacons.²³

3.1.2 — *Right to have preaching by presbyters and deacons*

Canon 764. Without prejudice to the prescript of can. 765, presbyters and deacons possess the faculty of preaching everywhere; this faculty is to be exercised with at least the presumed consent of the rector of the church,

²⁰ See John M. HUELS, “The Act of ‘Admitting’ a Lay Person to Preach in a Church or an Oratory,” in *StC*, 45 (2011), 443-484.

²¹ Cf. *CIC*, c. 757. Presbyterorum, qui quidem Episcoporum cooperatores sunt, proprium est Evangelium Dei annuntiare; praesertim hoc officio tenentur, quoad populum sibi commissum, parochi alique quibus cura animarum concreditur; diaconorum etiam est in ministerio verbi populo Dei, in communione cum Episcopo eiusque presbyterio, inservire.

²² See CORIDEN, Commentary on c. 757, in *CLSA Comm2*, 921; J.M. HUELS, “The Ministry of the Divine Word (Canons 756-761),” in *StC*, 23 (1989), 325-344; J.H. PROVOST, “Brought Together by the Word of the Living God (cc. 762-772),” in *StC*, 23 (1989), 345-371.

²³ See FUENTES, Commentary on c. 757, in *Exegetical Comm*, vol. 3/1, 62.

unless the competent ordinary has restricted or taken away the faculty or particular law requires express permission.²⁴

According to c. 764, presbyters and deacons have the faculty to preach by their very ordination. The law itself grants to the ordained, at the moment of their ordination to the diaconate, the faculty to preach everywhere, “to be exercised with at least the presumed consent of the rector of the Church, unless the competent ordinary has restricted or taken away the faculty or particular law requires express permission.” A grave cause would be necessary to remove a faculty that the law itself has provided for the benefit of the faithful.²⁵ The faculty by law for presbyters and deacons to preach everywhere coincides with their duty to preach and thereby facilitates the right of the faithful to preaching by their ordained ministers.

3.1.3 — *Right to the homily*

Canon 767 §2. A homily must be given at all Masses on Sundays and holy days of obligation which are celebrated with a congregation, and it cannot be omitted except for a grave cause.

§4. It is for the pastor or rector of a church to take care that these prescripts are observed conscientiously.²⁶

The second paragraph of c. 767, in the strongest language, imposes the canonical obligation to preach the homily, which must be given (*homilia habenda est*) at all Masses on Sundays and holy days of obligation that are celebrated with a gathering of people. It may only be omitted for a grave cause (*nisi gravi de causa*). Since this is a law containing an exception, the exception must be strictly interpreted (c. 18). Strict interpretation in this instance means that the cause for omitting the homily must be truly grave and not be merely a just cause. Given the gravity of this obligation, the faithful implicitly have an equally important right to have the homily preached to them at Masses on Sundays and holy days of obligation.

²⁴ Cf. *CCEO*, c. 610, §2-§3; *CIC*, c. 764. *Salvo praescripto can. 765, facultate ubique praedicandi, de consensu saltem praesumpto rectoris ecclesiae exercendae, gaudent presbyteri et diaconi, nisi ab Ordinario competenti eadem facultas restricta fuerit aut sublata, aut lege particulari licentia expressa requiratur.*

²⁵ See CORIDEN, Commentary on c. 764, in *CLSA Comm2*, 926; see also D. SALACHAS, “Problemi interrituali nei due Codici orientale e latino,” in *Ap*, 67 (1994), 660-661; ID., *Il magistero e l’evangelizzazione dei popoli nei Codici latino e orientale: Studio teologico-giuridico comparativo*, Bologna, Centro Editoriale Dehoniano, 2001.

²⁶ Cf. *CCEO*, c. 614, §2; §4 *CIC*, c. 767, §2. *In omnibus Missis diebus dominicis et festis de praeepto, quae concursu populi celebrantur, homilia habenda est nec omitti potest nisi gravi de causa.* §4. *Parochi aut ecclesiae rectoris est curare ut haec praescripta religiose serventur.*

The fourth paragraph determines the competence and duty of those who, besides the Holy See and diocesan bishop, are responsible for enforcing these norms on the homily, that is, the norms of paragraphs 1-3 of c. 767. It is the responsibility of the pastor or the rector of a church (*parochi aut ecclesiae rectoris est curare*) to ensure that these norms are faithfully observed. The same competency and duty may be attributed to the religious superior, chaplain, or other priest who has charge of a church (cf. c. 19).²⁷ Since these priests have the duty to ensure that a homily is preached at all Masses on Sundays and holy days, it follows that the faithful who attend their churches have the right to such preaching.

3.1.4 — *Right to preaching based on Church teachings*

Canon 768 §1. Those who proclaim the divine word are to propose first of all to the Christian faithful those things which one must believe and do for the glory of God and the salvation of humanity.

§2. They are also to impart to the faithful the doctrine which the magisterium of the Church sets forth concerning the dignity and freedom of the human person, the unity and stability of the family and its duties, the obligations which people have from being joined together in society, and the ordering of temporal affairs according to the plan established by God.²⁸

This canon is an exhortation in the present subjunctive on the content of preaching, which demonstrates the practical meaning of the ministry of the word. Both paragraphs of the canon stress that preaching should center on the basic and primary aspects of our faith: that which we must do and believe for the glory of God, that is, the necessary relationship of the word with the morals and teachings of the Church.²⁹ Since those who preach are exhorted to include these matters in their preaching, it follows that the faithful have

²⁷ See FUENTES, Commentary on c. 767, in *Exegetical Comm*, vol. 3/1, 93; see also L. ROBITAILLE, "An Examination of Various Forms of Preaching: Toward an Understanding of the Homily and Canons 766-767," in *CLSAP*, 58 (1996), 308-325; J. FOX, "The Homily and the Authentic Interpretation of Canon 767, §1," in *Ap*, 62 (1989), 123-169; J.C. ERRÁZURIZ M., *Il "munus docendi": diritti e doveri dei fedeli*, Ateneo Romano della Santa Croce Monografie Giuridiche 4, Milan, Dott. A. Giuffrè Editore, 1991; L. WRENN, *Authentic Interpretations on the 1983 Code*, Washington, DC, Canon Law Society of America, 1993.

²⁸ Cf. *CCEO*, c. 616; *CIC*, c. 768 §1. Divini verbi praecones christifidelibus imprimis proponant, quae ad Dei gloriam hominumque salutem credere et facere oportet.

§2. Impertiant quoque fidelibus doctrinam, quam Ecclesiae magisterium proponit de personae humanae dignitate et libertate, de familiae unitate et stabilitate eiusque muniis, de obligationibus quae ad homines in societate coniunctos pertinent, necnon de rebus temporalibus iuxta ordinem a Deo statutum componendis.

²⁹ See FUENTES, Commentary on c. 763, in *Exegetical Comm*, vol. 3/1, 97.

an implicit right to have homilies and other forms of preaching that incorporate these values.

3.1.5 — *Right to meaningful preaching*

Canon 769. Christian doctrine is to be set forth in a way accommodated to the condition of the listeners and in a manner adapted to the needs of the times.³⁰

Canon 769 is an exhortation on the manner of preaching. The Christian teaching that is the content of preaching must be adapted to the listeners, according to their condition and times. The canon grants the faithful an implicit right to have homilies and other forms of preaching be made meaningful for them in keeping with their own condition and life circumstances. In the post-synodal apostolic exhortation *Evangelii gaudium*, Pope Francis calls on preachers to know the heart of their community (EG, no. 137). He tells them to preach homilies that are neither entertainment nor a lecture (EG, no. 138), to prefer images to the use of examples (EG, no. 157), to give full attention to the biblical texts (EG, nos. 146 and 152), and to relate the texts to the lived experience of the listeners (EG, no. 154). He also calls on preachers to develop good delivery skills which, he says, is “a profoundly spiritual concern” (EG, no. 156).

3.1.6 — *Right in diocesan law to spiritual exercises and sacred missions*

Canon 770. At certain times according to the prescripts of the diocesan bishop, pastors are to arrange for those types of preaching which are called spiritual exercises and sacred missions or for other forms of preaching adapted to needs.³¹

According to c. 770, the faithful may also have an implicit right, depending on particular law, to have preaching in the form of spiritual exercises or sacred missions. The canon is an exhortation, leaving it to diocesan law (*iuxta Episcopi diocesani praescripta*) to regulate this matter. If the bishop decrees that parishes are to offer either or both of these forms of preaching, then the faithful have the implicit right to it in accord with the terms of the diocesan law.

³⁰ Cf. CCEO, c. 626; CIC, c. 769. Doctrina christiana proponatur modo auditorum conditioni accommodato atque ratione temporum necessitatibus aptata.

³¹ Cf. CCEO, c. 615; CIC, c. 770. Parochi certis temporibus, iuxta Episcopi dioecesani praescripta, illas ordinent praedicationes, quas exercitia spiritualia et sacras missiones vocant, vel alias formas necessitatibus aptatas.

Cf. J. WALLACE, “Reconsidering the Parish Mission,” in *Worship*, 67 (1993), 340-351.

3.2 — The right to catechetical formation

Catechetics, or catechetical formation (*catechetica institutio*), is an important aspect in the formation in faith of the Christian faithful. It is a principal form of the ministry of the divine word along with preaching. This formation includes both the teaching of Christian doctrine in a systematic way and the experience of Christian living.³² Here we will consider those canons on catechetical formation that imply a right of the faithful to this formation or some aspect of it.³³

The Church has issued several major documents since the Second Vatican Council that have shaped and promoted catechetical formation, among these the General Catechetical Directory (1971),³⁴ which was revised as the General Directory for Catechesis (1997),³⁵ and the *praenotanda* of the Rite of Christian Initiation of Adults (RCIA),³⁶ which is a major source of universal law for the Latin Church. Another important source, magisterial rather than juridical, is the *Catechism of the Catholic Church*,³⁷ which is complemented by catechisms prepared under the auspices of the conferences of bishops and diocesan bishops. Also noteworthy is the Apostolic Letter of Pope John Paul II on catechesis, *Catechesi tradendae* (CT).³⁸

3.2.1 — Right to catechetical formation

Canon 773. It is a proper and grave duty especially of pastors of souls to take care of the catechesis of the Christian people so that the living faith of

³² See CORIDEN, Commentary on cc. 773-780, in CLSA *Comm2*, 933.

³³ See R. BARRETT, "The Rights to Adequate Catechesis as a Fundamental Right of the Faithful," in *Ap*, 70 (1997), 185-223, 200 (=BARRETT, "The Rights to Adequate Catechesis as a Fundamental Right of the Faithful").

³⁴ SACRED CONGREGATION FOR THE CLERGY, *Directorium catechisticum generale, Ad normam decreti*, 11 April 1971, in AAS, 64 (1972), 97-176; *General Catechetical Directory*, Washington, USCC, 1971.

³⁵ CONGREGATION FOR THE CLERGY, *Directorium generale pro catechesi*, 15 August 1997, Libreria Editrice Vaticana, 1997; *General Directory for Catechesis*, Washington, USCC, 1998.

³⁶ See *Ordo Initiationis christianae adultorum*, editio typica, 6 January 1972, Typis Polyglottis Vaticanis, 1972 [OICA]; adapted English version *Rite of Christian Initiation of Adults*, Washington, International Committee on English in the Liturgy (=ICEL), 1985.

³⁷ See *Catechismus Ecclesiae catholicae*, editio typica, Libreria Editrice Vaticana, 1997.

³⁸ See JOHN PAUL II, Apostolic Letter *Catechesi tradendae*, 16 October 1979, in AAS, 71 (1979), 1277-1340, *FLANNERY2*, 762-814 (=CT).

the faithful becomes manifest and active through doctrinal instruction and the experience of Christian life.³⁹

Canon 773 speaks of the aim of catechetical formation: “that the living faith of the faithful becomes manifest and active through doctrinal instruction and the experience of Christian life.”⁴⁰ The canon makes clear that especially the pastors of souls (*pastores animarum*) have a proper and grave duty to provide catechetical formation for their faithful.⁴¹ The pastors have this primary duty to supervise the catechetical endeavour. They have a duty *ex iustitia* to see that catechesis is offered to the faithful entrusted to their care.⁴² Pastors of souls are bishops, pastors of parishes, vicars, chaplains, and others to whom a community of the faithful is entrusted.⁴³ Implied in this grave duty of the pastors is the strong right of the faithful to catechetical formation.

3.2.2 — *Right to a catechism and other instruments of catechesis*

Canon 775 §1. Having observed the prescripts issued by the Apostolic See, it is for the diocesan bishop to issue norms for catechetics, to make provision that suitable instruments of catechesis are available, even by preparing a catechism if it seems opportune, and to foster and coordinate catechetical endeavors.

§2. If it seems useful, it is for the conference of bishops to take care that catechisms are issued for its territory, with the previous approval of the Apostolic See.⁴⁴

³⁹ Cf. *CCEO*, c. 617; *CIC*, c. 773. *Proprium et grave officium pastorum praesertim animarum est catechesim populi christiani curare, ut fidelium fides, per doctrinae institutionem et vitae christianae experientiam, viva fiat explicita atque operosa.*

⁴⁰ See FUENTES, Commentary on c. 773, in *Exegetical Comm*, vol. 3/1, 108; see also M.T. HAGARTY, “The Code, Catechesis, and the Concept ‘Experience’: A Commentary on Canon 773,” in *Jur*, 61 (2001), 239-256; R.J. BARRETT, “The Normative Status of the Catechism,” in *Periodica*, 85 (1996), 9-34; E.C. EUSEBIO, Jr., “Integrated Catechesis: The Redaction History of Canons 773 and 779 of the 1983 Code of Canon Law,” in *Philippiniana Sacra*, 143 (2013), 53-76.

⁴¹ See CORIDEN, Commentary on c. 773, in *CLSA Comm1*, 555.

⁴² See M. CONTE A CORONATA, *Institutiones iuris canonici*, vol. 2, Turin, 1931, 253 (=CONTE A CORONATA, *Institutiones iuris canonici*). See also FUENTES, Commentary on c. 773, in *Exegetical Comm*, vol. 3/1, 110.

⁴³ See CORIDEN, Commentary on c. 773, in *CLSA Comm1*, 555.

⁴⁴ Cf. *CCEO*, c. 622, §3; 622, §2; *CIC*, c. 775, §1. *Servatis praescriptis ab Apostolica Sede latis, Episcopi dioecesani est normas de re catechetica edicere itemque prospicere ut apta catechesis instrumenta praesto sint, catechismum etiam parando, si opportunum id videatur, necnon incepta catechetica fovere atque coordinare.*

§2. *Episcoporum conferentiae est, si utile videatur, curare ut catechismi pro suo territorio, praevia Sedis Apostolicae approbatione, edantur.*

This canon deals with the role of the Apostolic See,⁴⁵ diocesan bishops and bishops' conference for the ministry of catechesis and preparing catechisms. The use of the predicate genitive in both paragraphs, with respect to the preparation of catechisms, indicates competencies of the bishop and the conference of bishops, not obligations. For the purpose of this study, the relevant part of the canon is that of the first paragraph which says the diocesan bishop is to make provision that suitable instruments of catechesis are available and to foster and coordinate catechetical endeavours. This is not just a competency but also an obligation, in light of the bishop's proper and grave duty to ensure catechetical formation, as seen above in c. 773 (cf. also c. 386). Since the bishop has this grave duty, it follows that the faithful have a strong right to adequate catechetical programs involving suitable catechetical materials.

3.2.3 — *Rights of parishioners to catechesis*

Canon 776. By virtue of his function, a pastor is bound to take care of the catechetical formation of adults, youth, and children, to which purpose he is to use the help of the clerics attached to the parish, of members of institutes of consecrated life and of societies of apostolic life, taking into account the character of each institute, and of lay members of the Christian faithful, especially of catechists. None of these are to refuse to offer their help willingly unless they are legitimately impeded. The pastor is to promote and foster the function of parents in the family catechesis mentioned in can. 774, §2.⁴⁶

This canon specifies one of the most important duties of the pastor (*parochus*). He is bound to take care (*tenetur curare*) of the catechetical formation

⁴⁵ Regarding the responsibilities of the Roman Pontiff and the bishops, cf. COUNCIL OF TRENT, *Sess. 24, de ref.*, Ch. 7, *Sess. 25, de indice et catechismo*, MANSI, *Sacrorum conciliorum nova et amplissima collectio*, vol. 33, Graz, 1961, cols. 160 and 194. See also FUENTES, *Commentary on c. 775*, in *Exegetical Comm.*, vol. 3/1, 117; M. SIMON, "Le catéchisme de Jean-Paul II. Une élaboration de douze années," in *Revue Théologique de Louvain*, 33 (2002), 211-238; J. PASSICOS, "Le statut des instruments de catéchèse dans le Code, in *Année Canonique*, 31 (1988), 147-156; and J. TOBIN, "The Diocesan Bishop as Catechist," in *StC*, 18 (1984), 365-414.

⁴⁶ Cf. *CCEO*, c. 624; *CIC*, c. 776. *Parochus, vi sui muneris, catechetica efformationem aduulorum, iuuenum et puerorum curare tenetur, quem in finem sociam sibi operam adhibeat clericorum paroeciae addictorum, sodalium institutorum vitae consecratae necnon societatum vitae apostolicae, habita ratione indolis uniuscuiusque instituti, necnon christifidelium laicorum, praesertim catechistarum; hi omnes, nisi legitime impediti, operam suam libenter praestare ne renuant. Munus parentum, in catechesi familiari, de quo in can. 774, §2, promoveat et foveat.*

of the flock in his parish (cf. c. 528, §1).⁴⁷ There is a moral and legal obligation on the pastor, in virtue of his office (*vi sui muneris*), to offer parish catechesis.⁴⁸ The pastor need not be directly involved with the catechesis; this responsibility can be shared with others who are willing to assist and collaborate with him. Three categories of people are mentioned whose assistance can be sought by the pastor. These are the clerics attached to the parish, both presbyters and deacons; men and women religious and members of secular institutes and societies of apostolic life in accord with the character of each institute or society; and finally lay persons, especially trained catechists. The law says that all of these should not refuse to offer their help willingly unless they are legitimately impeded (*omnes, nisi legitime impediti, operam suam libenter praestare ne renuant*). From the strong obligation in this canon, there is implied the corresponding strong right of parishioners to have catechetical formation in their parish, be they adults, youth, or children.

3.2.4 — Right to different forms of catechesis

Canon 777. Attentive to the norms established by the diocesan bishop, a pastor is to take care in a special way:

- 1° that suitable catechesis is imparted for the celebration of the sacraments;
- 2° that through catechetical instruction imparted for an appropriate period of time children are prepared properly for the first reception of the sacraments of penance and the Most Holy Eucharist and for the sacrament of confirmation;
- 3° that having received first communion, these children are enriched more fully and deeply through catechetical formation;
- 4° that catechetical instruction is given also to those who are physically or mentally impeded, insofar as their condition permits;
- 5° that the faith of youth and adults is strengthened, enlightened, and developed through various means and endeavors.⁴⁹

⁴⁷ See F.G. MORRISEY, “The Teaching Office of the Church,” in CLSGBI *Comm*, 429 (=MORRISEY, “The Teaching Office of the Church”).

⁴⁸ See FUENTES, Commentary on c. 776, in *Exegetical Comm*, vol. 3, 122; M. BALAM MEDINA, “La función de enseñar del párroco,” in *RMDC*, 9 (2003), 63-91; J.P. DOSS, “Giovani e scelte nella vita cristiana: alcune considerazioni canoniche,” in *Salesianum*, 79 (2017), 377-403.

⁴⁹ Cf. *CIC* c. 777. Peculiari modo parochus, attentis normis ab Episcopo dioecesano statutis, curet:
 1° ut apta catechesis impertiatur pro sacramentorum celebratione;
 2° ut pueri, ope catecheticae institutionis per congruum tempus impertitae, rite praeparentur ad primam receptionem sacramentorum paenitentiae et sanctissimae Eucharistiae necnon ad sacramentum confirmationis;

Like cc. 766, §4 and 771 with respect to preaching, c. 777 lays emphasis on particular duties of the pastor in the ministry of the divine word with respect to catechetical formation in the parish. The pastor is exhorted to see to these matters, observing any diocesan norms that may exist. The first two duties pertain to preparation for the sacraments. A third duty of the pastor is to see to the continuing catechetical formation of children after first Communion so that their knowledge and faith can grow and deepen. A fourth duty of pastors is to see to the catechetical formation of persons with physical or mental disabilities as far as their condition permits. Finally, the pastor must take care to offer faith formation to youth and adults by various means and endeavors so that their faith be strengthened, enlightened, and developed. From all these duties arises the implicit right of parishioners to these specific dimensions of catechetical formation.⁵⁰

3.2.5 — *Right to catechesis in the works of institutes and societies*

Canon 778. Religious superiors and superiors of societies of apostolic life are to take care that catechetical instruction is imparted diligently in their churches, schools, and other works entrusted to them in any way.⁵¹

Canon 778 exhorts religious superiors and superiors of societies of apostolic life to take care that catechetical formation is a part of their institute's or society's ministry, be it in their churches, schools, or other works that are entrusted to them in any way. From this obligation follows an implicit right to catechesis enjoyed by the faithful who attend the churches, schools, and other works of these institutes and societies. The obligation does not apply when members of these institutes or societies are simply working for a parish, school, or other institution in the charge of the diocese or another public juridic person.⁵²

3° ut iidem, prima communione recepta, uberius ac profundius catechetica efformatione excolantur;

4° ut catechetica institutio iis etiam tradatur, quantum eorum condicio sinat, qui corpore vel mente sint praepediti;

5° ut iuvenum et adultorum fides, variis formis et inceptis, muniatur, illuminetur atque evolvatur.

⁵⁰ See CORIDEN, Commentary on c. 777, in CLSA *Comm2*, 936; A. PERLASCA, "La prima confessione dei fanciulli nel dinamismo dell'iniziazione cristiana," in *QDE*, 18 (2005), 79-102.

⁵¹ Cf. *CIC* c. 778. Curent Superiores religiosi et societatum vitae apostolicae ut in suis ecclesiis, scholis aliisque operibus sibi quoquo modo concreditis, catechetica institutio sedulo impertiatur.

⁵² See CORIDEN, Commentary on c. 778, in CLSA *Comm2*, 937. See also J. FUENTES, "The Active Participants in Catechesis and Their Dependence on the Magisterium (Canons 773-780)," in *StC*, 23 (1989), 373-386.

3.2.6 — *Right to suitable catechetical aids*

Canon 779. Catechetical instruction is to be given by using all helps, teaching aids, and instruments of social communication which seem more effective so that the faithful, in a manner adapted to their character, capabilities and age, and conditions of life, are able to learn Catholic doctrine more fully and put it into practice more suitably.⁵³

As part of the right to catechesis, there is also an implied right in the law to suitable or adequate materials for catechesis. This canon is a wise pastoral encouragement about the means to be used in the catechetical ministry that includes necessary adaptation of modern methods in achieving these goals.⁵⁴ The canon furthermore sets forth the duty of persons responsible for catechesis to use tools of all kinds, stipulating that they are to be adapted to the needs (and to the rights) of the faithful.⁵⁵ The aim of utilizing these different means is so that the faithful may more fully learn Catholic teaching and, in turn, put it into practice. This canon should be read in conjunction with the canons on the instruments of social communication, especially 827 §§1 and 2 on catechisms and books used for religious instruction.⁵⁶

3.3 — Rights Pertaining to Catholic Education

In this section, we deal with rights that are related to Catholic education, which is the subject of Title III of Book III of the Code.⁵⁷ The canons of this

⁵³ Cf. *CICc.* 779. *Institutio catechetica tradatur omnibus adhibitibus auxiliis, subsidiis didacticis et communicationis socialis instrumentis, quae efficaciora videantur ut fideles, ratione eorum indoli facultatibus et aetati necnon vitae condicionibus aptata, plenius catholicam doctrinam ediscere eamque aptius in praxim deducere valeant.*

⁵⁴ See CORIDEN, Commentary on c. 779, in *CLSA Comm1*, 559.

⁵⁵ See FUENTES, Commentary on c. 779, in *Exegetical Comm*, vol. 3/1, 131.

⁵⁶ See J.M. HUELS, *The Teaching Office of the Catholic Church: A Commentary on Book III of the Code of Canon Law*, Ottawa, Saint Paul University Faculty of Canon Law, 2017, 131 (=HUELS, *The Teaching Office of the Catholic Church*).

⁵⁷ The Church has the duty and right to educate people because of its divinely given mission to help them attain the fullness of their Christian lives. The Church seeks to vindicate its rights against sometimes hostile governments. Pastors have the responsibility to see that all of the faithful enjoy some form of Catholic education (c. 794); parents have the duty and the right to educate their children. This includes the right and obligation to choose the most suitable means for the Catholic education of their offspring. The state should assist parents in providing for this religious formation (c. 793). Parents' prerogatives loom large in the Code, including Catholic schools as well as other means of education, e.g., public and private schools and programmes of religious instruction. For a detailed study on Catholic education with the duties and obligations of parents, see P. BAILLARGEON, *The Canonical*

Title reflect the teachings of Vatican II's Declaration on Christian Education, *Gravissimum educationis*,⁵⁸ in asserting the rights and responsibilities of the various Christian faithful in this area.⁵⁹ The canons of concern to this study, those containing rights of the faithful, treat the following matters: the establishment and promotion of Catholic schools (c. 800, §1), schools patronised by the diocesan bishop (c. 802), vigilance over Catholic religious formation and education (c. 804, §2), vigilance over Catholic instruction (c. 806, §2), the responsibility for appointing teachers in universities (c. 810, §1), provision for theological studies (c. 811, §1), and the mandate to teach in Catholic colleges and ecclesiastical universities. Commenting on this section on Catholic education, John Huels emphasizes that the Latin word *educatio* not only means formal or classroom education but has the broader meaning of the "upbringing" of a child. This broader meaning is consistent with the canonical obligation and right of parents to provide Catholic education and formation for their children.⁶⁰

Rights and Duties of Parents in the Education of their Children, JCD dissertation, Saint Paul University, Ottawa, 1986 (=BAILLARGEON, *The Canonical Rights and Duties of Parents*).

⁵⁸ See SECOND VATICAN COUNCIL, Declaration on Christian Education *Gravissimum educationis*, 28 October 1965 (= GE), in AAS, 58 (1966), 728-756, FLANNERY I, 725-737.

⁵⁹ See S.A. EUART, Commentary on cc. 793-821, in CLSA *Comm*2, 953.

⁶⁰ The basic rights and obligations of parents in the matter of the religious education of their children is a concern of the Code in several places. Canon 226, §2 makes a reference to the "right" of parents to educate their children, while the conciliar passage at this point referred only to the obligation. In some of the canons in Book III, the law refers to "Christian" education, but more often it will speak of "Catholic" education. When the law, however, speaks of "Christian" education, it can usually be assumed from the context that, in fact, it means "Catholic." For instance, in c. 226, §2, it is stated that Christian education is to be provided in accordance with the teaching of the Church. For Catholic education, see cc. 793, 794, 798, and 801, and compare with cc. 226, 802, and 835, §4.

In some instances, we must recognize that parents are not available to carry out the fundamental obligation of educating the children. This can be because of death or other unfortunate circumstances. For this reason, the canons often refer to those who take their place: cc. 774, 793, 868, 914. Among other canons referring to rights and obligations of parents relative to education, we could note c. 799 on the right to education in conformity with the religious and moral convictions of the parents; c. 1055, §1 on the nature of Christian marriage; cc. 1125, 1154, 1366, 1689, and so forth.

As general background on this theme, see BAILLARGEON, *The Canonical Rights and Duties of Parents*. See also F.G. MORRISEY, "The Rights of Parents in the Education of their Children (Canons 796-806)," in *StC*, 23 (1989), 429-444 (= MORRISEY, "The Rights of Parents in the Education of their Children"); and M.T. CERDÁ DONAT, "Educación católica y sociedad civil," in *Anuario de Derecho Canónico*, 5 (2016), 165-187; HUELS, *The Teaching Office of the Catholic Church*, 178.

3.3.1 — *Right to educate and right to a Catholic education*

Canons 794 §1. The duty and right of educating belongs in a special way to the Church, to which has been divinely entrusted the mission of assisting persons so that they are able to reach the fullness of the Christian life.

§2. Pastors of souls have the duty of arranging everything so that all the faithful have a Catholic education.⁶¹

This canon concerns a right and duty with respect to educating and a right to a Catholic education. The first paragraph of the canon establishes explicitly the duty and right of the Church of educating. Since the Church is the people of God, this duty and right pertains to all the *christifideles*. It is a duty and right of the divine law, entrusted to the Church by Christ (cf. cc. 204, §1, 211, 216, 225).⁶² By fulfilling this duty and right of educating, all the Christian faithful comprising the Church of Christ work for the realization of God's plan and carry out its mission of evangelization and salvation to all people.⁶³

The second paragraph of c. 794 lays the primary duty on pastors of souls to provide everything towards Catholic education (*officium est omnia disponendi*).⁶⁴ The canon expresses a duty, not a right, but the right to a Catholic education is implicitly contained in the duty of the pastors of souls to provide it. The *pastores animarum* are those office holders who have the care of souls, especially diocesan bishops, pastors, parochial vicars, and chaplains.⁶⁵ Regarding the pastor of a parish (*parrochus*), c. 528, §1 speaks about the special care of the parish priest for the Catholic education of children and young people.⁶⁶ As Coriden asserts, however, it is ultimately the community

⁶¹ Cf. *CCEO*, c. 628; *CIC*, c. 794, §1. *Singulari ratione officium et ius educandi spectat ad Ecclesiam, cui divinitus missio concredita est homines adiuvandi, ut ad christianae vitae plenitudinem pervenire valeant.*

§2. *Animarum pastoribus officium est omnia disponendi, ut educatione catholica omnes fideles fruuntur.*

⁶² See D. CITO, Commentary on c. 794, in *Exegetical Comm*, vol. 3/1, 200; see also G. DE LIMA, "Catholic Education: Challenges and Prospects," in *Vidyajyoti*, 69 (2005), 675-686 (= DE LIMA, "Catholic Education"); J. CHINGANTHARA, "Catholic Education: Perspectives of Canon Law," in *The Living Word*, 116 (2010), 292-310; J. GALLAGHER, "Parents Right to Educate: A 'Right' Inalienable," in *Homiletic and Pastoral Review*, 76 (1976), 29-54.

⁶³ See EUART, Commentary on c. 794, in *CLSA Comm2*, 954; cf. H.A. BUETOW, *The Catholic School: Its Roots, Identity, and Future*, New York, Crossroad Publishing, 1988.

⁶⁴ See HUELS, *The Teaching Office of the Catholic Church*, 182.

⁶⁵ Ibid. See also CORIDEN, Commentary on c. 794, in *CLSA Comm1*, 555.

⁶⁶ See MORRISEY, "The Rights of Parents in the Education of their Children," 436. See also M.A. HAYES, "As Stars for All Eternity: A Reflection on Canons 793-795," in *StC*, 23 (1989), 409-427 (=HAYES, "As Stars for All Eternity").

of faith which must bear the real responsibility, while the pastors are the stimulators and coordinators of the effort.⁶⁷

3.3.2 — *Right to schools imbued with a Christian spirit*

Canon 802 §1. If schools which offer an education imbued with a Christian spirit are not available, it is for the diocesan bishop to take care that they are established.

§2. Where it is expedient, the diocesan bishop is to make provision for the establishment of professional schools, technical schools, and other schools required by special needs.⁶⁸

The first paragraph of this canon treats the responsibility of the diocesan bishop to see to the establishment of schools filled with the Christian spirit if they are lacking in his diocese. Implicit in this responsibility of the bishop is the right of the faithful to have such schools in their diocese. Although the canon is directed to the diocesan bishop personally, he does not necessarily have to found diocesan schools as such. Rather, if schools imbued with a Christian spirit are lacking, he is to take care that they are established (*est curare ut condantur*), implying a mild right of the faithful to such schools. He can fulfill this responsibility by inviting lay persons, associations of the faithful, religious institutes, societies of apostolic life, and others to establish schools *in quibus educatio tradatur christiano spiritu imbutu*.⁶⁹

The second paragraph of this canon addresses the possible need for various kinds of schools, not just those that teach the Catholic religion but also professional, technical and other schools required for special needs of the local Church. It is left to the discretion of the bishop to determine whether this is advantageous for his diocese. Certainly, the need for such schools varies from region to region. The canon offers the examples of professional and technical schools, but it is open to any kind of school, leaving it to the diocesan bishop to determine whether to establish them.⁷⁰ This is not a strict duty of the bishop, so the faithful do not have a strict right to these schools. Rather, the implicit right in the canon is the same as that explicitly stated in

⁶⁷ See CORIDEN, Commentary on c. 794, in CLSA *Comm1*, 565.

⁶⁸ Cf. CCEO, c. 635; CIC, c. 802, §1. Si praesto non sint scholae in quibus educatio tradatur christiano spiritu imbuta, Episcopi dioecesani est curare ut condantur.

§2. Ubi id expediat, Episcopus dioecesanus provideat ut scholae quoque condantur professionales et technicae necnon aliae quae specialibus necessitatibus requirantur.

⁶⁹ See CITO, Commentary on c. 802, in *Exegetical Comm*, vol. 3/1, 220.

⁷⁰ See EUART, Commentary on c. 802, in CLSA *Comm2*, 957.

c. 800, §1, namely, the right of the Church to establish and direct schools of any discipline, type, and level.

3.3.3 — *Right to good teachers of religion*

Canon 804 §2. The local ordinary is to be concerned that those who are designated teachers of religious instruction in schools, even in non-Catholic ones, are outstanding in correct doctrine, the witness of a Christian life, and teaching skill.⁷¹

This canon lays the responsibility on the ordinary of the place concerning the requisite qualities of the teachers of the Catholic religion, whether in a Catholic school or non-Catholic school. He is to be solicitous (*sollicitus sit*) that the teachers of religious instruction in schools are outstanding (*prae-stantes*) in these qualities. This is not only the responsibility of the diocesan bishop for vigilance and supervision of the religious education effort as seen in the first paragraph of this canon, but this second paragraph of the canon addresses the local ordinary, including the vicar general and episcopal vicar within their competence.⁷² The canon emphasizes the duty of ensuring that those appointed as teachers of religion in schools, even non-Catholic, are outstanding in correct doctrine, are a witness of the Christian life, and have an adequate ability to teach.⁷³ Implicit in this requirement is the right of the faithful to have teachers of religion who are “outstanding in correct doctrine, the witness of a Christian life, and teaching skill.”

3.3.4 — *Right to a good education in Catholic schools*

Canon 806 §2. Directors of Catholic schools are to take care under the watchfulness of the local ordinary that the instruction which is given in them is at least as academically distinguished as that in the other schools of the area.⁷⁴

⁷¹ Cf. *CCEO*, c. 639; *CIC*, c. 804, §2. *Loci Ordinarius sollicitus sit, ut qui ad religionis institutionem in scholis, etiam non catholicis, deputentur magistri recta doctrina, vitae christianae testimonio atque arte paedagogica sint praestantes.*

⁷² See EUART, Commentary on c. 804 in *CLSA Comm2*, 959.

⁷³ See CITO, Commentary on c. 804, in *Exegetical Comm*, vol. 3/1, 231; cf. W. GALVIN, “Ecclesiastical Legislation on Christian Education with Special Application to Current Problems,” in *Jur*, 14 (1954), 463-480.

⁷⁴ Cf. *CCEO*, c. 634, §3; *CIC*, c. 806, §2. *Curent scholarum catholicarum Moderatores, advigilante loci Ordinario, ut institutio quae in iisdem traditur pari saltem gradu ac in aliis scholis regionis, ratione scientifica sit praestans.*

This canon concerns the quality of education in Catholic schools. It is mainly directed to those who are administrators and focuses on the quality of the educational programs in the school, in particular, that the instruction in the Catholic school not be inferior to that of other schools in the area. The local ordinary also has a role in that he is to be vigilant in overseeing the responsibility of the directors of Catholic schools. The word “directors” of Catholic schools refers to those who are actually in the governance of the schools (principal, vice-principal, pastor, administrator, school board, etc).⁷⁵ Implicit in this duty of the directors is the right of the faithful to have Catholic schools that are at least as academically distinguished as other schools of the area.

3.3.5 — *Rights concerning professors, Catholic doctrine*

Canon 810 §1. The authority competent according to the statutes has the duty to make provision so that teachers are appointed in Catholic universities who besides their scientific and pedagogical qualifications are outstanding in integrity of doctrine and probity of life and that they are removed from their function when they lack these requirements; the manner of proceeding defined in the statutes is to be observed.

§2. The conferences of bishops and diocesan bishops concerned have the duty and right of being watchful so that the principles of Catholic doctrine are observed faithfully in these same universities.⁷⁶

The canon is directed to the authorities competent to determine the quality of teachers appointed to Catholic universities and to watch over the observance of Catholic doctrine.⁷⁷ The two paragraphs of the canon, by imposing duties on the authorities mentioned, imply concomitant rights of the faithful, namely, the right to have teachers in Catholic universities who are outstanding in integrity of doctrine and probity of life and the right to

⁷⁵ See HUELS, *The Teaching Office of the Catholic Church*, 214; J.P. BEAL, “Where’s the Body? Where’s the Blood? The Teaching Authority of the Diocesan Bishop and the Rights of Catholic School Teachers,” in *CLSAP* (1995), 91-128; B.A. CUSACK, *A Study of the Relationship between the Diocesan Bishop and Catholic Schools below the Level of Higher Education in the United States: Canons 801-806 of the 1983 Code of Canon Law*, Canon Law Studies, no. 525, Washington, DC, Catholic University of America, 1988.

⁷⁶ Cf. c. 810, §1. Auctoritati iuxta statuta competenti officium est providendi ut in universitatibus catholicis nominentur docentes qui praeterquam idoneitate scientifica et paedagogica, doctrinae integritate et vitae probitate praestent utque, deficientibus his requisitis, servato modo procedendi in statutis definito, a munere removeantur.

§2. Episcoporum conferentiae et Episcopi dioecesani, quorum interest, officium habent et ius invigilandi, ut in iisdem universitatibus principia doctrinae catholicae fideliter servantur.

⁷⁷ See EUART, Commentary on c. 810, in *CLSA Comm2*, 965.

have Catholic universities in which the principles of Catholic doctrine are observed faithfully.

The first paragraph addresses the institutional authority who has this responsibility in virtue of the university's own statutes.⁷⁸ The canon gives general guidance regarding acceptable norms for the appointment and removal of teachers in Catholic colleges and universities. The canon also instructs that specific criteria and procedures should be developed by the individual institutions to assist in the application of the norms.⁷⁹ The two qualities of the university professors are stated here: one related to scientific and pedagogical expertise and the other concerning doctrinal integrity and uprightness of life.⁸⁰

The second paragraph addresses the duty and right of vigilance over the observance of Catholic doctrine in Catholic colleges and universities, a duty and explicit right of the episcopal conference and the diocesan bishop.⁸¹ What could this duty and right of vigilance imply? It certainly does not imply ownership, governance, jurisdiction, control, intervention, or even visitation. Those are all levels of authority and responsibility distinct from the *ius invigilandi*. Rather, it means the duty and right of a pastoral watchfulness and a solicitous oversight.⁸² The bishops are successors of the apostles (c. 753) and authoritative teachers of the faith (c. 386, §1) and so are competent to make judgments regarding the observance of Catholic teaching.⁸³ Moreover, the faithful have an implied right to doctrinal vigilance by the conference of bishops in virtue of its duty (*officium*) to provide it.

⁷⁸ See CORIDEN, Commentary on c. 810, in CLSA *Comm1*, 574.

⁷⁹ See EUART, Commentary on c. 810, in CLSA *Comm2*, 965; cf. G. DE LIMA, "Catholic Education," 675-686.

⁸⁰ See CITO, Commentary on c. 810, in *Exegetical Comm*, vol. 3/1, 253.

⁸¹ Some of the duties of the diocesan bishop given in the Code may have consequences for both ecclesiastical universities and faculties and Catholic universities and other institutes of higher studies located in the bishop's territory. E.g., the bishop is obliged to protect firmly the integrity and unity of the faith by whatever means seem most appropriate, while at the same time recognising a lawful freedom of research (c. 386, §2). Related duties include protecting the unity of the universal Church, promoting its discipline and insisting on the observance of all ecclesiastical laws, and preventing abuses from creeping into ecclesiastical discipline (c. 392). See CORIDEN, Commentary on cc. 807-814, in CLSA *Comm1*, 574.

⁸² See CORIDEN, Commentary on c. 810, in CLSA *Comm1*, 574. See also T.J. GREEN, "The Church's Teaching Mission: Some Aspects of Normative Role of Episcopal Conferences," in *StC*, 27 (1993), 23-57.

⁸³ See EUART, Commentary on c. 810, in CLSA *Comm2*, 965. See also D.M. O'CONNELL, *An Analysis of Canon 810 of the 1983 Code of Canon Law and Its Application to the Catholic Universities and Institutes of Higher Studies*, JCD dissertation, Washington, Catholic University of America, 1990.

3.3.6 — *Right to theological instruction*

Canon 811 §1. The competent ecclesiastical authority is to take care that in Catholic universities a faculty or institute or at least a chair of theology is erected in which classes are also given for lay students.

§2. In individual Catholic universities, there are to be classes which especially treat those theological questions which are connected to the disciplines of their faculties.⁸⁴

The first paragraph of this canon makes it mandatory upon the ecclesiastical authorities to promote the teaching of theology in Catholic colleges and universities, also for the benefit of the lay students. Here the canon does not specify who that ecclesiastical authority actually is, but it would include the Holy See, episcopal conferences, and diocesan bishops. The canon offers three options for theological programs in Catholic universities: a faculty (or department), an institute, or a chair of theology. The choice and discernment depend on the situation of the college or university and its resources.⁸⁵

The second paragraph reflects the concern that theological studies are not to be isolated from the other academic disciplines in the educational enterprise. Such interaction between these disciplines enriches theology, and it gives a better understanding of the world today and its needs.⁸⁶ Both paragraphs of the canon contain implicit rights of the faithful—in the first paragraph, the right to have theology taught in a Catholic university and, in the second, the right that theological questions also be addressed in some of the other disciplines offered at the university.

Canon 812. Those who teach theological disciplines in any institutes of higher studies whatsoever must have a mandate from the competent ecclesiastical authority.⁸⁷

This canon establishes the requirement of an ecclesiastical mandate (*mandatum*)⁸⁸ for those who teach theological disciplines in Catholic institutions of

⁸⁴ Cf. *CCEO*, c. 643; *CIC*, c. 811, §1. Curret auctoritas ecclesiastica competens ut in universitatibus catholicis erigatur facultas aut institutum aut saltem cathedra theologiae, in qua lectiones laicis quoque studentibus tradantur.

§2. In singulis universitatibus catholicis lectiones habeantur, in quibus eae praecipue tractentur quaestiones theologicae, quae cum disciplinis earundem facultatum sunt conexas.

⁸⁵ See CORIDEN, Commentary on c. 811, in *CLSA Comm1*, 575.

⁸⁶ See EUART, Commentary on c. 811, in *CLSA Comm2*, 966; cf. J. P. BEAL, “Catholic Theological Faculties in the United States,” in *StC*, 37 (2003), 443-466.

⁸⁷ Cf. *CCEO*, c. 644; *CIC*, c. 812. Qui in studiorum superiorum institutis quibuslibet disciplinas tradunt theologicas, auctoritatis ecclesiasticae competentis mandatum habeant oportet.

⁸⁸ The conference of bishops of the USA, in their particular norms, offers a good explanation of the juridical nature of the *mandatum*. 1) The *mandatum* is fundamentally an

higher learning.⁸⁹ All those who teach the theological disciplines, including the laity (cf. c. 229, §3), in any institutes of higher studies are required to have a mandate.⁹⁰ The word “mandate” is used variously in canon law, at times to denote a person’s acting in the name of the one mandating, while other times acting in one’s own name but with a juridical tie to the Church in virtue of the mandate granted by ecclesiastical authority.⁹¹ It is the latter meaning at play in this canon.

acknowledgement by Church authority that a Catholic professor of a theological discipline is a teacher within the full Communion of the Catholic Church. 2) The *mandatum* should not be construed as an appointment, authorization, delegation, or approbation of one’s teaching by Church authorities. Those who have received a *mandatum* teach in their own name in virtue of their baptism and their academic and professional competence, not in the name of the bishop or of the Church’s magisterium. 3) The *mandatum* recognizes the professor’s commitment and responsibility to teach authentic Catholic doctrine and to refrain from putting forth as Catholic teaching anything contrary to the Church’s magisterium.

The question of what are the “theological disciplines” for which a professor requires a mandate is best regulated in particular law, preferably in the implementing legislation of the conference of bishops or, lacking that, in diocesan law or the university statutes. In addition to its particular law implementing *Ex corde Ecclesiae*, the bishops’ conference of the USA issued some “Guidelines” on the *mandatum*. In these Guidelines, the theological disciplines for which professors must have a mandate to teach are specified as Scripture, dogmatic theology, moral theology, pastoral theology, canon law, liturgy, and church history. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, The Application of *Ex corde Ecclesiae* for the United States, 17 November 1999, in *CLD*, vol. 14, 755-777, art. 4, no. 4 e. Although binding only in the USA, the norms were granted the *recognitio* of the Congregation for Catholic Education on 3 May 2000. Insofar as this indicates the *praxis Curiae Romanae* (c. 19), the norms may be used to interpret the law in other places if a lacuna should arise. See also NATIONAL CONFERENCE OF CATHOLIC BISHOPS, Guidelines concerning the Academic *mandatum* in Catholic Universities (canon 812), 15 June 2001, in *Origins*, 31 (2001), 128-131, no. 2 d.

⁸⁹ See EUART, Commentary on c. 811, in *CLSA Comm2*, 966.

⁹⁰ Who is obliged to seek the mandate from the ecclesiastical authority, the university or the professor? The answer is suggested in the canon by the words any institutes (*in institutis quibuslibet*) of higher studies. The word *quibuslibet* (“any at all”) indicates that the legislator is going beyond the immediate context of these canons which only treat Catholic universities and similar institutes of higher studies and is here concerned with teaching theology in any such institution at all, including non-Catholic institutions. It follows that this canon does not bind the university but only the individual professors and, moreover, only professors who are Catholic. This is evident from the rule of canon 11: only Catholics are bound by canon law.

⁹¹ See R.P. DEELEY, *The Mandate for Those Who Teach Theology in Institutes of Higher Learning: An Interpretation of Canon 812 of the Code of Canon Law*, Rome, Pontificia Università Gregoriana, 1986; ID., “An Interpretation of Canon 812,” in *CLSAP*, 50 (1988), 70-85. See also E.F. DALY, “The Needed Mandate to Teach,” in *CLSAP*, 46 (1984), 114-129; P. DE POOTER, “La ‘mission canonique’ el le ‘mandatum’ au sein des universités ecclésiastiques et catholiques: un jeu de mots ou une distinction plus fondamentale?” in *IE*, 14 (2004), 595-618; S.A. EUART, Church-State Implications in the United States of Canon

James Conn states that the purpose of the mandate of c. 812 “is to assure the community that someone teaching theology is doing so in communion with the Church, that he is faithful to the Magisterium, and that he is not proposing doctrine that is opposed to it. The Catholic faithful and the parents of Catholic youth have a right to this assurance in choosing institutions of higher education. This right is enshrined in the law in a variety of places and is derivative of other guaranteed rights....” He mentions the rights in cc. 213, 217, 226, §2, 793, §1 and 797.⁹² Conn makes this conclusion about the right of the faithful, not on the basis of the wording of c. 812, but on his deep research and reflection on the canon that resulted in his doctoral thesis on this subject. No right can be discerned from the wording of the canon itself, so it is not an implicit right but is better characterized as a *tacit* right, a right that can be known only in consideration of other laws.

3.4 — Rights in the Canons on Instruments of Social Communication

The canons of Title IV of Book III are centered on books and on the means of censorship of them to preserve the Church’s doctrine and make it known. Three canons in this Title contain implicit rights of the faithful flowing from duties imposed on office holders. These are the duties of the pastors regarding writings and other media (c. 823) and therequirements for textbooks used in schools and for writings available in churches for display and distribution (c. 827); there is also an implicit right in c. 822, as follows.

812 of the 1983 Code of Canon Law, JCD dissertation, Washington, DC, Catholic University of America, 1989; L. ÖRSY, “The Mandate to Teach Theological Disciplines: Glosses on Canon 812 of the New Code,” in *Theological Studies*, 44 (1983), 476-488; R. PAGÉ, “La responsabilité des évêques dans l’enseignement: le mandat,” in *IE*, 5 (1993), 699-717; A. DULLES, “The Mandate to Teach,” in *America*, 158 (1988), 293-295; and HUELS, *The Teaching Office of the Catholic Church*, 242.

⁹² On the other hand, he/she who teaches in virtue of a “mandate” continues to exercise his/her own personal responsibility as a Christian faithful, because the mandate does not communicate any sharing in the authentic magisterium nor any particular function within the Christian community. It simply is an official attestation from the hierarchical superior that the one teaching is a Catholic in communion with the Church, and in the content of his/her teaching there is nothing to contradict this good standing. See J.J. CONN, “The Mandate of Can. 812 Revisited,” in J.J. CONN and L. SABBARESE (eds.), *Iustitia in caritate. Miscellanea di studi in onore di Velasio de Paolis*, Vatican City, Urbaniana University, 2005, 227-248, at 246-247. See also HUELS, *The Teaching Office of the Catholic Church*, 242.

3.4.1 — *Rights concerning instruments of social communication*

Canon 822 §1. The pastors of the Church, using a right proper to the Church in fulfilling their function, are to endeavor to make use of the instruments of social communication.

§2. These same pastors are to take care to teach the faithful that they are bound by the duty of cooperating so that a human and Christian spirit enlivens the use of instruments of social communication.

§3. All the Christian faithful, especially those who in any way have a role in the regulation or use of the same instruments, are to be concerned to offer assistance in pastoral action so that the Church exercises its function effectively through these instruments.⁹³

The first two paragraphs are exhortations directed to the *pastores Ecclesiae*. The obligations are laid on the pastors of the Church, in fulfilling their office (*munus*), to be diligent in making use of the instruments of social communication.⁹⁴ The third paragraph is directed to all the faithful.⁹⁵

The first paragraph of the canon exhorts the pastors of the Church to use the instruments of social communication in carrying out their pastoral responsibility.⁹⁶ The canon asserts that the Church has the right to use media in fulfilling her mission, and the pastors are to use this right that is proper to the Church.⁹⁷ Since the pastors of the Church have the obligation (albeit not strong) to make use of the media in exercising the *munus docendi*, it follows that the Christian faithful have an implicit right that the media be used for evangelizing and educational purposes.

The second paragraph is also addressed to the *pastores Ecclesiae*. Their duty here is to instruct the faithful on their own duty to imbue the world of social communications with a human and Christian spirit.⁹⁸ The implicit right

⁹³ Cf. *CCEO*, c. 651; *CIC*, c. 822, §1. *Ecclesiae pastores, in suo munere explendo iure Ecclesiae proprio utentes, instrumenta communicationis socialis adhibere satagant.*

§2. *Iisdem pastoribus curae sit fideles edocere se officio teneri cooperandi ut instrumentorum communicationis socialis usus humano christianoque spiritu vivificetur.*

§3. *Omnes christifideles, ii praesertim qui quoquo modo in eorundem instrumentorum ordinatione aut usu partem habent, solliciti sint operam adiutricem actioni pastoralis praestare, ita ut Ecclesia etiam his instrumentis munus suum efficaciter exerceat.*

⁹⁴ See PONTIFICAL COUNCIL FOR SOCIAL COMMUNICATIONS, pastoral instruction *Aetatis novae* on social communications, 22 February 1992, in *AAS*, 84 (1992), 447-468; English translation in *Origins*, 21 (1991-1992), 669-677.

⁹⁵ See HUELS, *The Teaching Office of the Catholic Church*, 288.

⁹⁶ See C. J. ERRÁZURIZ, Commentary on c. 822, in *Exegetical Comm*, vol. 3/1, 294; cf. V. CRUZ, "Canon Law on Media," in *PCF*, 7 (2005), 205-228.

⁹⁷ See CORIDEN, Commentary on c. 822, in *CLSA Comm1*, 579.

⁹⁸ See ERRÁZURIZ, Commentary on c. 822, in *Exegetical Comm*, vol. 3/1, 294.

of the faithful is to have some formation (pastoral letters, classes, etc) on how the uses of the instruments of social communication are to be animated with a human and Christian spirit. Some of the lay faithful have more influence over the management of the media than do ecclesiastical authorities, so they are the faithful most in need of such formation.⁹⁹

The final paragraph stipulates that all the faithful, especially those involved in the world of communications, are to be diligent in supporting the Church's pastoral action taking place through communications media.¹⁰⁰ This is an exhortation that has more the character of a general obligation than a right.

3.4.2 — *Right to publications free of doctrinal error*

Canon 823 §1. In order to preserve the integrity of the truths of faith and morals, the pastors of the Church have the duty and right to be watchful so that no harm is done to the faith or morals of the Christian faithful through writings or the use of instruments of social communication. They also have the duty and right to demand that writings to be published by the Christian faithful which touch upon faith or morals be submitted to their judgment and have the duty and right to condemn writings which harm correct faith or good morals.

§2. Bishops, individually or gathered in particular councils or conferences of bishops, have the duty and right mentioned in §1 with regard to the Christian faithful entrusted to their care; the supreme authority of the Church, however, has this duty and right with regard to the entire people of God.¹⁰¹

This canon is about pastoral and ecclesiastical vigilance over writings and other media, particularly those dealing with subjects touching on faith or morals (*mores*). Paragraph one of the canon lists three duties that are also rights of the hierarchy (the *pastores Ecclesiae*). The first is the duty of vigilance over the content of books or other media so that they do not harm the faith or morals of the Christian faithful. The second is the right and duty to

⁹⁹ See CORIDEN, Commentary on c. 822, in *CLSA Comm1*, 579.

¹⁰⁰ See ERRÁZURIZ, Commentary on c. 822, in *Exegetical Comm*, vol. 3, 294.

¹⁰¹ Cf. *CCEO*, c. 652; *CIC*, c. 823, §1. Ut veritatum fidei morumque integritas servetur, officium et ius est Ecclesiae pastoribus invigilandi, ne scriptis aut usu instrumentorum communicationis socialis christifidelium fidei aut moribus detrimentum afferatur; item exigendi, ut quae fidem moresve tangant a christifidelibus edenda suo iudicio subiciantur; necnon reprobandi scripta quae rectae fidei aut bonis moribus noceant.

§2. Officium et ius, de quibus in §1, competunt Episcopis, tum singulis tum in conciliis particularibus vel Episcoporum conferentiis adunatis quoad christifideles suae curae commissos, supremæ autem Ecclesiae auctoritati quoad universum Dei populum.

demand a prior review of those writings related to faith and morals. The third is the right and duty to admonish (*reprobare*) those writings that are harmful to the rectitude of the faith or good morals.¹⁰² The first right and duty applies to writings and other media of social communication; the second and third are limited to writings (*scripta*). These three duties and rights of the pastors collectively imply a right of the faithful, namely, the right to Catholic books and other means of social communication that are free of doctrinal and moral error. The means for assuring this right are laid down in the subsequent canons of Title III, especially c. 827 as treated below.

The second paragraph of c. 823 specifies the “pastors of the Church” who are competent to deal with the issues mentioned in paragraph one of this canon. The episcopal prerogatives can be exercised either individually by the diocesan bishop himself or collegially when bishops gather in a particular council or in the episcopal conference. The canon gives this right and duty to the individual diocesan bishops by the use of the expression “with regard to the Christian faithful committed to their care,”¹⁰³ which is also applied to the circumscriptions of the particular council and conference of bishops. The exercise of this duty and right for the universal Church is the responsibility of the supreme authority of the Church, the pope and the college of bishops, who are assisted by the Roman Curia, especially the Congregation for the Doctrine of the Faith.

3.4.3 — Rights concerning specific publications

Canon 827 §2. Books which regard questions pertaining to sacred scripture, theology, canon law, ecclesiastical history, and religious or moral disciplines cannot be used as texts on which instruction is based in elementary, middle, or higher schools unless they have been published with the approval of competent ecclesiastical authority or have been approved by it subsequently. §4. Books or other writings dealing with questions of religion or morals cannot be exhibited, sold, or distributed in churches or oratories unless they have been published with the permission of competent ecclesiastical authority or approved by it subsequently.¹⁰⁴

¹⁰² See ERRÁZURIZ, Commentary on c. 823, in *Exegetical Comm*, vol. 3, 301; cf. H. SCHMITZ, “Das Nihil Obstat des Diözesanbischofs,” in *AKK*, 170 (2001), 51-73.

¹⁰³ See CORIDEN, Commentary on c. 823, in *CLSA Comm1*, 580.

¹⁰⁴ Cf. *CCEO*, c. 659; *CIC*, c. 827, §2. Nisi cum approbatione competentis auctoritatis ecclesiasticae editi sint aut ab ea postea approbati, in scholis, sive elementariis sive mediis sive superioribus, uti textus, quibus institutio nititur, adhiberi non possunt libri qui quaestiones recipiunt ad sacram Scripturam, ad theologiam, ius canonicum, historiam ecclesiasticam, et ad religiosas aut morales disciplinas pertinentes.

This canon has four paragraphs, two of which contain implicit rights of the faithful. Paragraph one concerns text books, and paragraph four is on books or other writings available in churches or oratories. The textbooks of paragraph two are those written and used for classroom instruction only. The textbooks that require ecclesiastical approval are those on sacred scripture, theology, canon law, Church history, and religious or moral disciplines. The approval may be given either before or after the book's publication. The competent authority is the local ordinary of the author or the publishing house (c. 824, §1). The canon alludes to schools at all levels, from primary stage through college, both those that are Catholic (c. 803) and non-Catholic schools in which the Catholic religion is taught (cf. c. 804).¹⁰⁵

Paragraph four deals with books or other writings on matters of religion or morals that are to be displayed, sold, or given away in churches or oratories. Such writings require an advanced ecclesiastical permission (*licentia*) prior to publication, or else a subsequent approval (*approbatio*) after publication. This rule is to be understood in light of the particular attention given in the law to churches and oratories by virtue of their sacred character (cf. cc. 1210 and 1213).¹⁰⁶ The prohibition of the fourth paragraph (*non possunt nisi*) is implicitly directed to and binds the pastors of parishes and other priests and superiors who have charge of churches and oratories (cf. 1214, 1223).¹⁰⁷

The two paragraphs of this canon are concrete applications of the right implied in c. 823. The faithful, consequently, have the right that the textbooks used for instruction in schools on religious subjects, as well as written materials on religion or morals distributed in their churches and oratories, are free of doctrinal errors harmful to their faith and good morals. This right flows not from the requirement placed on the author or publisher to seek the imprimatur but rather from the duty of the local ordinary to exercise vigilance over the media and his obligation to demand that writings on religious subjects be submitted to his judgment, as discussed above with reference to c. 823.

§4. In ecclesiis oratoriis exponi, vendi aut dari non possunt libri vel alia scripta de quaestionibus religionis aut morum tractantia, nisi cum licentia competentis auctoritatis ecclesiasticae edita sint aut ab ea postea approbata.

¹⁰⁵ See HUELS, *The Teaching Office of the Catholic Church*, 312.

¹⁰⁶ See ERRÁZURIZ, Commentary on c. 827, in *Exegetical Comm*, vol. 3/1, 317; cf. R. BARRETT, "The Pitfalls of the Imprimatur: A Gloss on Canon 827 §2," in *Angelicum*, 77 (2000), 165-202.

¹⁰⁷ See HUELS, *The Teaching Office of the Catholic Church*, 313.

3.5 — Additional Rights in Book III

In the introductory canons of Book III, one finds two explicit rights and one implicit right, each rooted in the divine law. The first of these is the right and duty of the “Church” to preach the gospel to all nations (c. 747, §1).¹⁰⁸ This is a right and duty of the divine positive law and is binding not just on the institutional Church but all baptized Christians (cf. c. 211). The second is a right of the divine natural law belonging to all persons (*homines*), baptized and unbaptized. This is the obligation and explicit right of all people to follow their own consciences in the discernment of truth about God and religion (c. 748, §1).¹⁰⁹ In its Declaration on Religious Liberty, the Second Vatican Council taught that God has made known to man the way in which He is to be worshiped, thus saved by Christ, and these teachings subsist in the Catholic and Apostolic Church. Religious freedom is necessary to worship God, and this entails immunity from coercion in civil society.¹¹⁰ The human person has a right to religious freedom, and no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly. This right has a foundation in the very dignity of the human person.¹¹¹

¹⁰⁸ Cf. *CCEO*, c. 595, §1; *CIC*, c. 747, §1. *Ecclesiae, cui Christus Dominus fidei depositum concredidit ut ipsa, Spiritu Sancto assistente, veritatem revelatam sancte custodiret, intimius perscrutaretur, fideliter annuntiaret atque exponeret, officium est et ius nativum, etiam mediis communicationis socialis sibi propriis adhibit, a qualibet humana potestate independentens, omnibus gentibus Evangelium praedicandi.*

Cf. J. ARRIETA, “The Active Subject of the Church’s Teaching Office (Canons 747-748),” in *StC*, 23 (1989), 243-256; J. BOYLE, *Church Teaching Authority: Historical and Theological Studies*, University of Notre Dame Press, 1995; ID., “Church Teaching Authority in the 1983 Code,” in *Jur*, 45 (1985), 136-170; R. ENO, *Teaching Authority in the Early Church*, Wilmington, Glazier, 1984; L.Z. LEGASPI, “The Teaching Office of the Church,” in *Philippiniana sacra*, 18 (1983), 417-446.

¹⁰⁹ Cf. *CIC*, c. 748, §1. *Omnes homines veritatem in iis, quae Deum eiusque Ecclesiam respiciunt, quaerere tenentur eamque cognitam amplectendi ac servandi obligatione vi legis divinae adstringuntur et iure gaudent.*

Cf. L. BLYSKAL, “Obsequium: A Case Study,” in *Jur*, 48 (1988), 559-589; J. BURKHARD, “*Sensus fidei*: Meaning, Role, and Future of a Teaching of Vatican II,” in *Louvain Studies*, 17 (1992), 18-34; T.J. GREEN, “The Teaching Function of the Church: A Comparison of Selected Canons in the Latin and Eastern Codes,” in *Jur*, 55 (1995), 93-140.

¹¹⁰ See *DH*, no. 1, in *AAS*, 58 (1966), 929-930, *Flannery*1, 799-800. On the importance of *DH* for Catholic teaching on religious freedom, see J.T. PAWLKOWSKI, “Catholicism and Human Rights in Light of the Shoah,” in C. RITTNER (ed.), *Learn, Teach, Prevent: Holocaust Education in the 21st Century*, Greensburg, PA, National Catholic Center for Holocaust Education, Seton Hill University, 2010, 72-73.

¹¹¹ See SECOND VATICAN COUNCIL, Declaration on Religious Liberty *Dignitatis humanae*, 7 December 1965, no. 2, in *AAS*, 58 (1966), 930-931, English translation in *Flannery*1, 800-801.

Following from this is the implicit right not to be coerced to embrace the Catholic faith against one's own conscience (c. 748, §2).¹¹² These latter two rights are not specific rights of *christifideles* but rights of all people.

In Title II of Book III, one finds an implicit right related to the divine law duty and right of the faithful to preach the gospel to all peoples. This is the "fundamental duty" of the faithful to "assume their own role in the mission work" of the Church (c. 781).¹¹³ This duty likewise implies a right: that the faithful have the right to participate in the Church's mission effort. Thus, ecclesiastical authorities must have an annual collection for the missions (cf. c. 791, 4^o) to enable the faithful minimally to exercise this right by contributing financially to the Church's missions. Canon 781 is the only canon of Title II of Book III (On the Mission Action of the Church) that has an implicit right pertaining to all the faithful. There is none in the final Title V (On the Profession of Faith).

Finally, there are two canons that declare a right, but not an obligation, of the Church. These are c. 800 §1 on the right of the Church to establish and direct schools and c. 807 on the right of the Church to erect and direct universities. Since the Church has the right—but no obligation—to provide schools and universities, these canons do not imply a right of the faithful. While there is a right to Catholic education, there is no specific right to have a Catholic school or university.

Conclusion

Canon law enunciates many rights—natural human rights, ecclesial rights, specific rights of office holders, religious, clerics, etc. Some of these rights are stated explicitly with the word *ius* or an equivalent expression. If the word "right" can be substituted for the equivalent expression with no change in meaning of the law, the right is explicit. Most of the rights in canon law are, however, only implicit but may be known from a study of the law's meaning in text and context. There are two principal categories of laws with

¹¹² Cf. *CCEO*, c. 586; *CIC*, c. 748, §2. *Homines ad amplectendam fidem catholicam contra ipsorum conscientiam per coactionem adducere nemini unquam fas est.*

¹¹³ Cf. *CCEO*, c. 584, §1; *CIC*, c. 781. *Cum tota Ecclesia natura sua sit missionaria et opus evangelizationis habendum sit fundamentale officium populi Dei, christifideles omnes, propriae responsabilitatis conscii, partem suam in opere missionali assumant.* Cf. A. REUTER, "The Missionary Activity of the Church (Canons 781-792)," in *StC*, 23, (1989), 387-407; F.J. URRUTIA, *De Ecclesiae munere docendi*, Rome, Universitas Gregoriana, 1983.

implicit rights. (1) When the law imposes an *obligation* on an office holder or minister, the faithful have a corresponding right that this obligation be fulfilled. (2) In establishing *other legal requirements*, the faithful have the implicit right that these requirements be observed.

There are certain grammatical indicators of implied rights. When the law uses a forceful verb (*debet, tenetur, oportet*, etc) or the passive periphrastic expression, a strong right is implied. On the other hand, when the law uses the present subjunctive or the predicate genitive expression, a milder right is indicated. Strong rights based on specific requirements of the law are more easily subject to vindication than are the milder rights.

The vindication and defense of rights is itself a fundamental, constitutional right of all the faithful (c. 221, §1).¹¹⁴ For the most part, however, the Christian faithful are unaware that they have rights in the Church; much the less do they know how rights may be vindicated. So, it falls to the canonist, principally, to educate the faithful about their rights in the Church, both those that are explicit and the many more that are implicit. For greatest effect, this formation should begin with those faithful in positions of pastoral leadership. Such education should include an overview of the various means for resolving disputes, grievances and violations of rights.

Numerous canons of the Latin Code explicitly or implicitly establish or declare rights common to all the *christifideles*. (See Appendix Two.) We have yet to mention, however, the important c. 1752 that refers to the “supreme law” of the Church, the *salus animarum*. It is our earnest desire that education of the faithful about their rights can move the Church a step forward to achieving its mission of the salvation of souls along our journey to the kingdom of God.

¹¹⁴ Commenting on c. 221, Robert Kaslyn expresses the view that administrative tribunals would really help to resolve a lot of issues that affect the faithful, among them, employment issues, school and pastoral issues, disputes involving the liturgy or reception of the sacraments, etc. KASLYN, Commentary on c. 221, in CLSA *Comm2*, 280.

APPENDIX ONE

Grammatical Indicators of Implicit Rights of the Faithful in the Code of Canon Law

I. Forceful Expressions in the Law Implying Rights

- A. Select canons with strong commands, prohibitions, requirements, and assertions in the present tense indicative mood, active or passive voice

57, 3	<i>non eximit competentem auctoritatem</i>
179, §2	<i>denegare nequit</i>
220	<i>nemini licet</i>
221, §1	<i>competit ut iura, gaudent</i>
386	<i>proponere et illustrare tenetur</i>
388	<i>debet applicare</i>
392, §1	<i>promovere et urgere tenetur</i>
395, §1	<i>tenetur lege</i>
396, §1	<i>tenetur obligatione</i> (also 528, 1)
528, §2	<i>invigilare tenetur</i>
776	<i>curare tenetur</i>
773	<i>proprium et grave officium est</i>
794, §2	<i>officium est omnia disponendi</i>
810, §1	<i>officium est</i>
810, §2	<i>officium habent</i>
823	<i>officium et ius est invigilandi</i>
827, §2	<i>adhiberi non possunt</i>
843, §1	<i>denegare non possunt</i>
846, §1	<i>serventur nemo addat, demat aut mutet</i>
859	<i>conferri potest et debet</i>
885	<i>obligatione tenetur curandi ut</i>
914	<i>parochi officium est curandi</i>
983, §1	<i>nefas est prodere</i>
984, §1	<i>Omnino prohibetur</i>
984, §2	<i>nullo modo uti potest</i>
986, §1	<i>obligatione tenetur</i>
986, §2	<i>obligatione tenetur</i>
1177, §1	<i>celebrari debent</i>
1267, §2	<i>repudiari nequeunt</i>
1267, §3	<i>nonnisi destinari possunt</i>

1277	<i>audire debet</i>
1284	<i>debet</i>
1287	<i>tenentur exhibendi</i>
1299, §2	<i>moneri debent</i>
1301	<i>vigilare potest ac debet</i>
1302	<i>debet exigere</i>
1321, §1	<i>nemo punitur</i>
1323	<i>nulli poenae est obnoxius</i>
1324	<i>temperari debet vel adhiberi</i>
1328, §1	<i>non tenetur</i>
1335	<i>vetitum suspenditur</i>
1342, §2	<i>irrogari vel declarari non possunt</i>
1347, §1	<i>irrogari valide nequit</i>
1349	<i>irrogare non potest</i>
1352, §1	<i>vetitum suspenditur</i>
1352, §2	<i>suspenditur</i>
1353	<i>habent effectum</i>
1362, §1	<i>extinguitur</i>
1363, §1	<i>extinguitur</i>
1717, §2	<i>cavendum est</i>
1723	<i>debet invitare</i>
1726	<i>debet declarare absolvere</i>
1728, §2	<i>non tenetur</i>

B. Select canons with the passive periphrastic (the future passive participle plus *est/sunt*)

767, §2	<i>habenda est</i>
1176, §1	<i>donandi sunt</i>
1176, §2	<i>celebrandae sunt</i>
1183, §1	<i>accensendi sunt</i>
1713, §1	<i>committi potest</i>
1720	<i>esse procedendum</i>
1722	<i>sunt revocanda</i>

II. Exhortations and Mild Requirements of the Law Implying Rights

A. Select canons in the present subjunctive

50	<i>auctoritas exquirat</i>
151	<i>ne differatur</i>

308	<i>nemo dimittatur</i>
383, §1	<i>Episcopus dioecesanus sollicitum se praebeat</i>
386, §1	<i>curet ut tradatur</i>
386, §2	<i>tueatur</i>
387	<i>promovere studeat</i>
392, §2	<i>advigilet</i>
394	<i>foveat atque curet</i>
489, §2	<i>destruantur</i>
491, §1	<i>curet Episcopus dioecesanus</i>
528, §2	<i>consulatsit; annitatur ut</i>
535	<i>prospiciat conscribantur atque asserventur</i>
536	<i>constituatur</i>
537	<i>habeatur</i>
768	<i>praecones propanant</i>
768, §2	<i>[praecones] impertiant</i>
769	<i>doctrina christiana proponatur</i>
770	<i>parochi ordinent</i>
778	<i>curent superiores religiosi ut impertiatur</i>
779	<i>institutio catechetica tradatur</i>
802, §1	<i>est curare ut condantur</i>
802, §2	<i>provideat ut condantur</i>
804, §2	<i>sollicitus sit deputentur</i>
806, §2	<i>curent sit</i>
811, §1	<i>curet erigatur</i>
811, §2	<i>habeantur</i>
822, §1	<i>adhibere satagant</i>
822, §2	<i>curae sit fideles edocere</i>
836	<i>excitare et illustrare sedulo curent</i>
848	<i>nihil petat</i>
861, §2	<i>solliciti sint</i>
863	<i>deferatur</i>
866	<i>confirmetur atque participet</i>
867, §2	<i>baptizetur</i>
868, §2	<i>licite baptizatur</i>
890	<i>curent instruuntur accedant</i>
891	<i>conferatur</i>
918	<i>ministretur</i>
921	<i>reficiantur</i>
922	<i>ne differatur advigilent</i>
937	<i>vacare possint</i>
964, §3	<i>ne excipiantur</i>

980	<i>ne denegetur nec differatur</i>
1001	<i>curent sublevantur</i>
1167, §2	<i>serventur</i>
1177, §3	<i>celebrentur</i>
1181	<i>serventur</i>
1188	<i>maneant exponantur</i>
1221	<i>sit</i>
1286	<i>servent praestant providere valeant</i>
1299, §2	<i>serventur</i>
1300	<i>vigilare potest ac debet</i>
1305	<i>deponantur, custodiantur</i>
1318	<i>ne comminetur ne constituat</i>
1319, §2	<i>ne feratur</i>
1341	<i>promovendam curet</i>
1349	<i>ne irroget</i>
1719	<i>custodiantur</i>
1723, §2	<i>nominet</i>

B. Select canons with the predicate genitive

757	<i>diaconorum est inservire</i>
767, §4	<i>parochi est curare</i>
775, §1	<i>Episcopi dioecesani est edicere</i>

III. Rights Implied in Canons with No Grammatical Indicators

18	208	868, §2
36	221, §1	889, §2
38	306	902
71	307, §2	913, §2
77	321	976
107	781	977
112, §1	791, 4° (read with 781)	1004
159	834	1222, §2
178	844, §4	1263

APPENDIX TWO

**Explicit and Implicit Rights of the Faithful
in the *CIC* and *CCEO***

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	18	1500
—	—	36 (2 rights)	1512, §§1-2 (2 rights)
—	—	38	1515
—	—	50	1517, §1
—	—	57, §3	1518
61	1528	—	—
—	—	71	—
—	—	77	1512, §3
98, §1	910	—	—
—	—	107	916
111, §2	30	—	—
—	—	112, §1, 1°	32
112, §1, 2°	33	—	—
112, §1, 3°	34	—	—
—	—	151	—
—	—	159	—
178 (2 rights)	958 (2 rights)	178	958
—	—	179, §2	961
187	967	—	—
189, §4 (2 rights)	—	—	—
—	—	208	11
209	12	—	—
210	13	—	—

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
211	14	—	—
212	15	—	—
213	16	—	—
214	17	—	—
215	18	—	—
216	19	—	—
217	20	—	—
218	21	—	—
219	22	—	—
—	—	220 (2 rights)	23
—	—	221, §1	24
221, §§2-3	24	—	—
222	25	—	—
223	26	—	—
299, §1	—	—	—
—	—	306	—
—	—	307, §2	578, §2
—	—	308	581
309	—	—	—
310	—	—	—
—	—	321	—
—	—	383	192, §1; 193, §2 678, §2; 192, §3
—	—	386	196
—	—	387	197
—	—	388	198
—	—	392	198

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	394	190
—	—	395	204
—	—	396	205, §1
—	—	487, §2	257, §2
—	—	489, §2	259, §2
—	—	491	261, §§1-2
519	282, §1	—	—
—	—	528	289
—	—	529	289, §3
—	—	535	296
—	—	536 & 537	295
747, §1	595, §1	—	—
748, §1	—	—	—
748, §2	586	—	—
—	—	757	—
—	—	761	—
762	—	—	—
763	610, §1	—	—
—	—	764	610, §§2-3
—	—	767, §2	614, §2
—	—	768, §1	616
—	—	769	626
—	—	770	615
—	—	773	617
—	—	775, §1	622, §3
—	—	775, §2	622, §2
—	—	776	624
—	—	777	—

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	778	—
—	—	779	—
—	—	781	584, §1
—	—	794	628
—	—	800, §1	—
—	—	802	635
—	—	804, §2	639
—	—	806, §2	634, §3
—	—	807	640, §1
—	—	810	—
—	—	811	643
—	—	812	644
—	—	822	651
—	—	823	652
—	—	827, §§1-2	659
—	—	834	668, §1
—	—	836	—
—	—	843, §1	381, §2
—	—	844, §4	671, §4
—	—	846, §1	668, §2; 674
—	—	848	—
—	—	859	—
—	—	861, §2	677, §2
—	—	865, §2	682, §2
—	—	866	—
—	—	867, §2	—
—	—	868, §2	681, §4
—	—	883, 3°	—

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	885	—
—	—	889, §2	—
—	—	890	695, §1
—	—	891	695, §1
—	—	902	701
912	—	—	—
—	—	913, §2	—
—	—	914	—
915	712	—	—
917	—	—	—
—	—	918	713, §1
—	—	921	708
—	—	922	—
—	—	937	—
—	—	964, §3	—
—	—	—	—
—	—	976	725
—	—	977	730
—	—	980	—
—	—	983	733
—	—	984	734, §§1-2
—	—	986, §2	735
—	—	990	—
991	—	—	—
994	—	—	—
—	—	1001	738, §1
—	—	1004	—
1058	778	—	—

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	1167, §2	867, §2
—	—	1176, §1 §2 (2 rights)	875
1177, §2	—	1177, §§1, 3	—
—	—	1181	878
—	—	1183, §1	875, 876, §§1-2
—	—	1188	886
1214	869, §1	—	—
—	—	1221	—
—	—	1222	873
—	—	1254, §2	1007
1261, §1	—	—	—
—	—	1263	1012
—	—	1267, §§1-3	1016
—	—	1277	263, §4
—	—	1284	1020, §1-2, 1028
—	—	1286	1030
—	—	1287	1031
—	—	1299	1043
1299, §1	1043	—	—
—	—	1300	1044
—	—	1301	1045
—	—	1302, §2	1046, §2
—	—	1305	1049
—	—	1313, §1	1412, §§2-3
—	—	1318	—
—	—	1319, §2	—
—	—	1321, §1	1414

Explicit Right		Implicit Right	
<i>CIC</i>	<i>CCEO</i>	<i>CIC</i>	<i>CCEO</i>
—	—	1323	1413, §1
—	—	1324	—
—	—	—	—
—	—	1328, §1	1418
—	—	1335	1435
—	—	1341	—
—	—	1342, §2	—
—	—	1347, §1	1407
—	—	1349	1409, §2
—	—	1352 (2 rights)	—
—	—	1353	1487, §2
—	—	1362, §1	1152, §§2-3
—	—	1363	1153
—	—	1717, §2	1468
—	—	1719	1470
—	—	1720	1486
1720, §1	1486	—	—
—	—	1722 (2 rights)	1473 (2 rights)
—	—	1723	1474
1725	1478	—	—
—	—	1726	1482
1727, §1	1481	—	—

THE MANAGEMENT OF CHURCH PROPERTY IN A SYNODAL CHURCH: TOWARDS ELIMINATING FINANCIAL MISCONDUCT*

JOHN ANTHONY RENKEN

SUMMARY — Pope Francis has repeatedly reflected upon the synodal nature of the Church, identifying synodality as a “constitutive element” of the pilgrim People of God. Synodality is to be found at all levels of ecclesial life, beginning within the particular Churches. This study proposes that a synodal approach to the management of finances, especially in dioceses and parishes, will eliminate most instances of financial malfeasance.

RÉSUMÉ — Le pape François s’est exprimé à maintes reprises sur la nature synodale de l’Église, identifiant la synodalité comme un « élément constitutif » du peuple pèlerin de Dieu. On retrouve la synodalité à tous les niveaux de la vie ecclésiale, commençant par les Églises particulières. Cette étude propose qu’une approche synodale de la gestion des finances, en particulier dans les diocèses et les paroisses, permettrait d’éliminer la plupart des cas de malversations financières.

Introduction

A grave scandal facing the worldwide Church today is the mismanagement of “ecclesiastical goods,” that is, the temporal goods which belong to dioceses, parishes, and other public juridic persons (c. 1257 §1). This mismanagement can take many forms but is always a violation of the trust of persons who give their temporal goods to further the mission of the Church (c. 1261 §1), which is realized in divine worship, support of ministers, and apostolic and charitable works, especially towards the needy (c. 1254 §1). This article proposes that a synodal approach to the management of finances

* This study expands on a presentation made on 23 October 2018 at the 53rd annual convention of the Canadian Canon Law Society, Hamilton, ON.

will eliminate most instances of financial malfeasance. The article, in three parts, will (1) reflect on the synodal nature of the Church, as proposed by Pope Francis; (2) revisit legislation on diocesan and parochial “synodal structures” which, if implemented in a synodal spirit, will deter financial malfeasance and safeguard church property; and (3) offer reflections on other practices within the “synodal Church” which would also deter financial malfeasance and safeguard church property.

1 — *The Synodal Nature of the Synodal Church*

A recurring theme of Pope Francis is “synodality.” In his address on 17 October 2015 commemorating the 50th anniversary of the establishment of the Synod of Bishops (hereinafter, “Jubilee Address”),¹ he presents profound and fundamental reflections on synodality. He says synodality is a “constitutive element of the Church” (*dimensione costitutiva della Chiesa*). He insists that “God expects the Church of the third millennium” to be synodal. Synodality is not optional. Synodality “is an easy concept to put into words, but not so easy to put into practice.” It is to be found at all levels of the Church, beginning with the particular Churches, where “organs of communion” must remain connected to the grass roots, the “base”.²

¹ POPE FRANCIS, Address in Ceremony Commemorating the 50th Anniversary of the Institution of the Synod of Bishops, 17 October 2015, in AAS, 107 (2015), 1138-1144, English translation at http://w2.vatican.va/content/francesco/en/speeches/2015/october/documents/papa-francesco_20151017_50-anniversario-sinodo.html (21 December 2018). For much more detailed reflections on this “Jubilee Address,” see John A. RENKEN, “Synodality: A Constitutive Element of the Church. Reflections in Pope Francis and Synodality,” in *Studia canonica*, 52 (2018), 5-44.

The Holy Father made reference to this address in his apostolic constitution on the synod of bishops, *Episcopalis communio*, 15 September 2018, 6, where he repeats that synodality is “a constitutive element of the Church.” English translation at http://w2.vatican.va/content/francesco/en/apost_constitutions/documents/papa-francesco_costituzione-ap_20180915_episcopalis-communio.html (21 December 2018).

² POPE FRANCIS states in the Jubilee Address: “The first level of the exercise of *synodality* is had in the particular Churches. After mentioning the noble institution of the Diocesan Synod, in which priests and laity are called to cooperate with the bishop for the good of the whole ecclesial community [CIC, cc. 460-468], the *Code of Canon Law* devotes ample space to what are usually called “organs of communion” in the local Church: the presbyteral council, the college of consultors, chapters of canons, and the pastoral council [CIC, cc. 495-514]. Only to the extent that these organizations keep connected to the “base” and start from people and their daily problems, can a synodal Church begin to take shape: these means, even when they prove wearisome, must be valued as an opportunity for listening and sharing.”

On 6 October 2017, in a message to the Consociatio Internationalis Iuris Canonici Promovendo gathering in Rome, Pope Francis said that canon law is to provide education about synodality in Church governance and other themes from Vatican Council II, such as collegiality, the responsibility of all the baptized in the Church's mission, ecumenism, etc.³ In 2018, Pope Francis authorized the publication of the study of the International Theological Commission entitled, "Synodality in the Life and the Mission of the Church."⁴

The term "synod" (σύνοδος) comes from two Greek words: σύν (with) and ὁδός (path, road, way).⁵ Synodality means simply and literally, profoundly and truly, that we accompany each other on the journey. It identifies our Christian "life" (*modus essendi*) and "mission" (*modus agendi*).⁶ This

³ POPE FRANCIS, "Message of the Holy Father for the 16th International Congress of the Consociatio Internationalis Studio Iuris Canonici Promovendo," 6 October 2017, at <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/10/06/171006h.html> (21 December 2018). He stated: "Like every Council, Vatican II is also destined to exert a long-lasting influence throughout the Church. Therefore, canon law can be a privileged instrument for favouring its reception over time and in the succession of generations. Collegiality, synodality in Church governance, valorisation of the particular Church, responsibility of all *christifideles* in the mission of the Church, ecumenism, mercy and proximity as primary pastoral principle, personal, collective, and institutional religious freedom, open and positive secularism, healthy collaboration between the ecclesial and civil communities in their diverse expressions, are some of the great themes where canon law can also fulfil an educational function, facilitating in the Christian people the growth of a feeling and of a culture that responds to Conciliar teaching."

⁴ INTERNATIONAL THEOLOGICAL COMMISSION, *Synodality in the Life and Mission of the Church*, 2 March 2018, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20180302_sinodalita_en.html (21 December 2018). The ITC had collaborated on this document 2014-2017, giving it final approval during the commission's 2017 plenary session.

⁵ Cardinal Donald W. WUERL comments that the term *synod* refers to a structure, and the term *synodality* refers to a process. "Pope Francis, Synodality, and *Amoris laetitia*," in *Origins*, 47 (2017-2018), 292.

⁶ Note the title of the document: INTERNATIONAL THEOLOGICAL COMMISSION: *Synodality in the Life and Mission of the Church*. [Emphasis mine.]

The Final Document of the 2018 Synod of Bishops states that synodality is a way of being and a way of acting: "In this Synod we have experienced how co-responsibility lived with young Christians is a source of profound joy for bishops too. We recognize in this experience a fruit of the Spirit which continually renews the Church and calls her to practise synodality as a way of being and acting, promoting the participation of all the baptized and of people of good will, each according to his age, state of life, and vocation" (n. 119). It also says that synodality characterizes the life and mission of the Church: "Synodality characterizes both the life and the mission of the Church, which is the People of God formed of young and old, men and women of every culture and horizon, and the Body of Christ, in which we are members one of another, beginning with those who are pushed to the margins and trampled upon. In the course of the exchanges and the testimonies, the Synod brought

“mission” is expressed most commonly and constantly in our routine interactions as missionary disciples. Less routinely, it is expressed in formally established ecclesial structures at various levels of the Church (for our purposes, dioceses and parishes): we will call these “synodal structures” to underscore that they are formally constituted “structures,” each with its own *raison d’être*, which must function in a “synodal” fashion.

1.1 — Synodality as the *Modus essendi* of Missionary Disciples

Synodality points out that missionary disciples accompany⁷ each other through this world to the eternal Kingdom. It explains “who we are”—we are *σύνοδοι*, fellow travelers on the journey. The term reveals our way of being (*modus essendi*) “on the move” together. It identifies our “life.” It explains how we are made: it is a “constitutive element” of the pilgrim People of God in *communio*. It is “common” (encompassing everyone) and it is “catholic” (existing everywhere). It recalls that we journey with the bonds of the same faith, sacraments, and pastoral leadership (see c. 205). Synodality describes the common “being” of the missionary disciples.

1.2 — Synodality as the *Modus agendi* of Missionary Disciples

Because synodality describes our way of being, it also explains our way of acting (*modus agendi*)—since “action follows being” (*agere sequitur esse*). It identifies our “mission.” Synodality is properly found in all aspects of our daily living as missionary disciples. It describes our dynamic mission as the followers of Jesus, who is the “Way” to the Father (John 14:6), in all our interactions and relationships everywhere. It highlights that we are a living people, co-responsible in the common task of evangelization, which is continuing the life-giving mission of Jesus, each with our unique gifts and vocations (see c. 208).⁸

to life certain fundamental traits of a synodal style: this is the goal of the conversion to which we are called” (n. 121). SYNOD OF BISHOPS, Final Document of the Synod of Bishops on Young People, Faith and Vocational Discernment, 27 October 2018, <http://www.synod2018.va/content/synod2018/en/fede-discernimento-vocazione/final-document-of-the-synod-of-bishops-on-young-people--faith-an.html> (21 December 2018).

⁷ See Pope FRANCIS’ treatment of “accompaniment” in apostolic exhortation *Evangelii gaudium*, 24 November 2013, in AAS, 105 (2013), 1019-1137, nn. 169-173, English translation at https://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html (21 December 2018).

⁸ The INTERNATIONAL THEOLOGICAL COMMISSION, reflecting on the life of the Church in the time of the New Testament, states: “So all are equally responsible for the life and mission

Synodality describes the common, constant, and daily “action” of missionary disciples. Outstanding among our common actions during our synodal journey is our common celebration of the liturgy, especially the Eucharist, the “source and summit of the life of the Church” (*LG* 11) where missionary disciples join in “full, conscious, and active participation” (*SC* 14).⁹ The very phrase “full, conscious, and active participation” is a “synonym” for synodality!

Moreover, sometimes certain missionary disciples gather in ecclesial structures (called “organs of communion” in each particular Church in the “Jubilee Address”),¹⁰ each of which has a unique *raison d’être*. These are

of the community and all are called to work in accordance with the law of mutual solidarity in respect of their specific ministries and charisms, inasmuch as every one of them finds his or her energy in the Lord (cf. *1 Corinthians* 15, 45).” *Synodality in the Life and Mission of the Church*, n. 22.

⁹ The Final Document of the 2018 Synod of Bishops explains that the Eucharist generates the synodality of the Church: “The eucharistic celebration generates the life of the community and the synodality of the Church. It is a place of transmission of the faith and formation for mission, in which it becomes evident that the community lives by grace and not by the work of our hands. In the words of the eastern tradition, we can say that the liturgy is an encounter with the Divine Servant who binds our wounds and prepares the paschal banquet for us, sending us out to do the same for our brothers and sisters. So let us reiterate that the commitment to celebrate with noble simplicity, involving various lay ministries, is an essential element of the Church’s missionary conversion. The young have shown that they appreciate and wish to engage deeply with authentic celebrations in which the beauty of signs and the care taken over preaching and community involvement truly speak of God. It is therefore necessary to promote their active participation, while keeping alive a sense of awe before the Mystery; to acknowledge their musical and artistic sensitivities, but also to help them understand that the liturgy is not purely self-expression but an action of Christ and the Church. It is equally important to help the young discover the value of eucharistic adoration as a prolongation of the celebration, in which to live contemplation and silent prayer.” *SYNOD OF BISHOPS, Final Document of the Synod of Bishops on Young People, Faith and Vocational Discernment*, n. 134.

¹⁰ In his Jubilee Address, Pope Francis calls these “organs of communion,” examples of which are the presbyteral council, the college of consultors, chapters of canons, and the pastoral council (*CIC*, cc. 495-514). In *Evangelii gaudium*, 31, he made reference to these same canons and also to canons 536-537 (on the parish pastoral council and the parish finance council), calling all these “means of participation.” In *Episcopalis communio*, 7, art. 6 §1, art. 19 §1, he calls them “organismi di partecipazione” (rendered on the Vatican website as “participatory bodies”).

The INTERNATIONAL THEOLOGICAL COMMISSION discusses the profound importance of structures of synodality: “The synodal dimension of the Church must be brought out by enacting and directing discernment processes which bear witness to the dynamism of communion that inspires all ecclesial decisions. Synodal life is expressed in structures and processes which lead, through various phases (preparation, celebration, reception), to synodal events in which the Church is called together in accordance with the various levels of implementing her essential synodality.” *Synodality in the Life and Mission of the Church*, n. 76.

formal, occasional, deliberate, intentional, specific gatherings of missionary disciples for a focused purpose. Within these structures, the disciples act in a truly synodal fashion, such that the proper common term for these groups is “structures of synodality” or “synodal structures.”

As mentioned, Pope Francis teaches that the exercise of synodality is to be found within such structures at all levels of the Church, beginning within the particular Churches. The Code of Canon Law identifies these structures, several of which we will consider below, since they have a direct relation with the management of church property.

1.3 — Firm Beliefs Necessary for an Effective Exercise of Synodality

For the exercise of synodality to bear fruit, missionary disciples will adhere to the following firm beliefs. Every missionary disciple, especially the church leader, enables the effective exercise of synodality to the measure that these beliefs are real and reflected in *praxis*.

1.3.1 — *The Firm Belief that the Spirit Generously Bestows Diverse but Complementary Gifts*

The effective exercise of synodality requires the firm faith that the Holy Spirit bestows diverse but complementary gifts upon the missionary disciples. Canon 204 §1 explains that all missionary disciples have been “made sharers in their own way in Christ’s priestly, prophetic, and royal function,” thereby sharing a “true equality regarding dignity and action by which they will cooperate in the building up of the Body of Christ according to each one’s own condition and function” (c. 208). At the same time, all missionary disciples have a common co-responsibility and unique gifts. All have the common tasks to maintain ecclesial *communio* (c. 209 §1), to fulfill their unique duties (c. 209 §2), to promote holiness both personal and ecclesial (c. 210), to proclaim the Good News at all times and in all places (c. 211), etc. Simultaneously, it is obvious that each missionary disciple has unique gifts of the Spirit, personal sacred *charisms* bestowed for individual and common good. There is a complementarity among the Spirit’s gifts. Indeed, the International Theological Commission explains that there is a “co-essentiality between hierarchical gifts and charismatic gifts in the Church.”¹¹ The Final Report of the 2018 Synod of Bishops

¹¹ INTERNATIONAL THEOLOGY COMMISSION, *Synodality in the Life and Mission of the Church*, n. 74. See *LG* 4, 12.

says: “Synodality is the method by which the Church can address ancient and new challenges, gathering and bringing into dialogue the gifts of all her members, starting with the young.”¹²

Each person, endowed with personal unique gifts, shares the common Christian vocation. No one disciple has *all* the possible gifts, insights, wisdom, or knowledge. Every disciple is enriched as all disciples share their charisms for the common good.

1.3.2 — *The Firm Belief that Mutual Listening and Candid Speaking are Essential*

The effective exercise of synodality requires the firm faith that mutual listening must be at the forefront in the collaboration of missionary disciples. In his Jubilee Address, Pope Francis says: “A synodal Church is a Church which listens, which realizes that listening ‘is more than simply hearing’ [*Evangelii gaudium*, 171]. It is a mutual listening in which everyone has something to learn.” Indeed, he reflected extensively about “the art of listening” in *Evangelii gaudium*, 171, where he writes:

We need to practice the art of listening, which is more than simply hearing. Listening, in communication, is an openness of heart which makes possible that closeness without which genuine spiritual encounter cannot occur. Listening helps us to find the right gesture and word which shows that we are more than simply bystanders. Only through such respectful and compassionate listening can we enter on the paths of true growth and awaken a yearning for the Christian ideal: the desire to respond fully to God’s love and to bring to fruition what he has sown in our lives.

The gift of mutual listening requires the prior act of freely speaking. Both the listening and the speaking must be done respectfully and compassionately. Persons should never fear speaking their minds fully, candidly, and boldly.¹³ Speakers should never be threatened with retaliation or retribution for what they share: “Fear is useless, what is needed is trust” (Luke 8:50).

¹² SYNOD OF BISHOPS, Final Document of the Synod of Bishops on Young People, Faith and Vocational Discernment, n. 144.

¹³ Pope Francis told the participants of the Synod of Bishops in 2014: “It is necessary to say with *parrhesia* all that one feels.” *Parrhesia* means boldness, candor, frankness, honesty. POPE FRANCIS, “Greetings of Pope Francis to the Synod Fathers during the First General Congregation of the Third Extraordinary General Assembly of the Synod of Bishops,” 6 October 2014, http://w2.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141006_padri-sinodali.html (21 December 2018).

The synodal experience is effective to the measure that the missionary disciples share both mutual listening and free speaking. Dialogue is essential for synodality. This effective dialogue requires personal formation, full disclosure of relevant information, total transparency, and fearless trust.

1.3.3 — *The Firm Belief that Consultation is Invaluable*

The effective exercise of synodality requires the firm faith that consultation has an invaluable role among missionary disciples. The International Theological Commission proposes:

The renewal of the Church's synodal life demands that we initiate processes for consulting the entire People of God.... This axiom [used in the Middle Ages and borrowed from Roman Law, *Quod omnes tangit, ab omnibus tractari et approbari debet*] should not be understood in the sense of conciliarism on the ecclesiological level or of parliamentarianism on a political level. It is more helpful to think in terms of exercising synodality at the heart of ecclesial communion.¹⁴

Consultation is common in the Church and takes many forms. It occurs most frequently outside formal synodal structures. Nonetheless, it is also the effective means for members of synodal structures to express formally their opinions on a vast array of issues. A synodal structure very commonly offers informal consultation, but sometimes it is required by the law to offer a formal *votum*. Most often this *votum* is a consultative *votum*. Depending on the structure itself, the issue being considered, and the law governing the structure's operation, sometimes members of synodal structures offer a consensual *votum* (more rarely) or even a deliberative *votum* (most rarely). Since most often a synodal structure offers its consultative *votum*, it is appropriate that its members and its leaders understand the invaluable role of consultation.¹⁵ The International Theological Commission explains this role:

The distinction between deliberative and consultative votes must not allow us to underrate the opinions expressed and votes made in various synodal

¹⁴ INTERNATIONAL THEOLOGY COMMISSION, *Synodality in the Life and Mission of the Church*, n. 65.

¹⁵ Recent sources which reflect upon the contribution of consultation in the Church include:

- CONGREGATION FOR BISHOPS AND CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, instruction on diocesan synods *In constitutione apostolica*, 19 March 1997, I, Introduction on the Nature and Purpose of the Diocesan Synod, n. 2, http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20041118_diocesan-synods-1997_en.html (21 December 2018);
- POPE JOHN PAUL II, apostolic letter at the close of the great Jubilee Year 2000 *Novo millennio ineunte*, 6 January 2001, n. 45, <http://w2.vatican.va/content/john-paul-ii/en/>

assemblies and councils. The expression *votum tantum consultivum*, which indicates the weight of evaluations and proposals in such august assemblies, is inadequate if it is understood according to the *mens* of civil law in its various expressions [cf. Francisco COCCOPALMERIO, “La ‘consultività’ del Consiglio pastorale parrocchiale e del Consiglio per gli affari economici della parrocchia,” in *Quaderni di diritto ecclesiale*, 1 (1988) 60-65].

The consultation that takes place in synodal assemblies is actually different, because the members of the People of God who take part in them are responding to the summons of the Lord, listening as a community to what the Spirit is saying to the Church through the Word of God which resonates in their situation, and interpreting the signs of the times with the eyes of faith. In the synodal Church the whole community, in the free and rich diversity of its members, is called together to pray, listen, analyse, dialogue, discern, and offer advice on taking pastoral decisions which correspond as closely as possible to God’s will. So, in coming to formulate their own decisions, Pastors must listen carefully to the wishes (*vota*) of the faithful....¹⁶

The International Theological Commission also teaches that, to be effective, consultation requires appropriate and adequate formation:

[T]he participation of the lay faithful becomes essential. They are the immense majority of the People of God and there is much to be learnt from their participation in the various forms of the life and mission of ecclesial communities, from popular piety and generic pastoral care, as well as their specific competency in various sectors of cultural and social life [*Evangelii gaudium*, 126].

Consulting them is thus indispensable for initiating processes of discernment in the framework of synodal structures. We must, therefore, overcome the

apost_letters/2001/documents/hf_jp-ii_apl_20010106_novo-millennio-ineunte.html (21 December 2018);

- POPE JOHN PAUL II, post-synodal apostolic exhortation *Pastores gregis*, 18 October 2003, n. 58, http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_20031016_pastores-gregis.html (21 December 2018);
- CONGREGATION FOR BISHOPS, Directory for the Pastoral Ministry of Bishops *Apostolorum successores*, 22 February 2004, Vatican City, Libreria Editrice Vaticana, 2004, nn. 171, 182 (= *Apostolorum successores*).
- INTERNATIONAL THEOLOGICAL COMMISSION, *Sensus Fidei in the Life of the Church*, 2014, nn. 120-122, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20140610_sensus-fidei_en.html (21 December 2018).

¹⁶ INTERNATIONAL THEOLOGY COMMISSION, *Synodality in the Life and Mission of the Church*, n. 68. It seems appropriate, in future legislation, to eliminate the adverb *tantum* when referring to consultation. It adds *nothing* to the expression “consultative *votum*.” It certainly does not extol the great importance of consultation in the Church, nor does it reflect the profound dignity of those who offer their wisdom and insights in the consultation process.

obstacles created by the lack of formation and recognised spaces in which the lay faithful can express themselves and act, and by a clerical mindset which runs the risk of keeping them on the edges of ecclesial life [*Evangelii gaudium*, 101]. This requires a priority commitment in the task of forming a mature ecclesial sense, which, at the institutional level, needs to be transformed into a regular synodal process.¹⁷

Through consultation with a group, and especially in the consensus reached, the church leaders are informed of the wisdom of the community, whose compass is the Holy Spirit. The synodal structure exercises the “process of *decision-making* through a joint exercise of discernment, consultation, and cooperation;” thereafter, the church leader, who must maintain the Apostolic Tradition and ecclesial *communio*, would implement the decision: this is “*decision-taking*.”¹⁸ Whenever the church leader is unable to accept the consultative *votum* of the synodal structure, the church leader will appropriately explain the reason, as any adult should do (see c. 127 §2, 2°).

Consultation has a rich tradition among missionary disciples. It performs an invaluable role which gives life, direction, and wisdom to the Church. Commonly, the Holy Spirit uses consultation as a vehicle to speak to the Churches.

1.3.4 — The Firm Belief that Clericalism is the Antithesis of Synodality

The effective exercise of synodality requires the firm faith that clericalism completely contradicts the synodal nature of the Church and opposes the work of the Holy Spirit. Clericalism is the attitude, resulting in actions, whereby a false superiority and unfounded privilege is assigned to, or claimed by, persons in the clerical state, resulting in a fabricated belief that clergy are entitled to dominate because they are “more than,” “better than,” or “superior to” those who are not ordained. This false claim of superiority can be rooted in the cleric’s presumed expert knowledge, divine mission, ontological change, etc.

The attitude of clericalism can exist in an individual cleric or within groups of clerics. It can also exist among lay persons who bestow an unfounded entitlement on the clergy to whom they defer, or who approximate themselves to clerics because they are seeking some share in clerics’

¹⁷ Ibid., n. 73.

¹⁸ Ibid., n. 69.

entitlement and status.¹⁹ Clericalism, which admits many forms, can be very subtle.²⁰

Clericalism is not rooted in the Gospel. It is always destructive and abusive. In his Jubilee Address, Pope Francis said that synodality reveals ministry as service: “the only authority is the authority of service, the only power is the power of the cross.” He insists that “in this Church, as in an inverted pyramid, the top is located beneath the base. Consequently, those who exercise authority are called ‘ministers,’ because, in the original meaning of the word, they are the least of all.” Repeatedly, Pope Francis has addressed the fundamental ecclesial dysfunction caused by clericalism. In *Evangelii gaudium*, 102, Pope Francis teaches that excessive clericalism can exclude lay persons from decision-making.

Lay people are, put simply, the vast majority of the people of God. The minority—ordained ministers—are at their service. There has been a growing awareness of the identity and mission of the laity in the Church. We can count on many lay persons, although still not nearly enough, who have a deeply-rooted sense of community and great fidelity to the tasks of charity, catechesis, and the celebration of the faith. At the same time, a clear awareness of this responsibility of the laity, grounded in their baptism and confirmation, does not appear in the same way in all places. In some cases, it is because lay persons have not been given the formation needed to take on important responsibilities. In others, it is because in their particular Churches room has not been made for them to speak and to act, due to an excessive clericalism which keeps them away from decision-making. Even if many are now involved in the lay ministries, this involvement is not reflected in a greater penetration of Christian values in the social, political, and economic sectors. It often remains tied to tasks within the Church, without a real commitment to applying the Gospel to the transformation of society. The formation of the laity and the evangelization of professional and intellectual life represent a significant pastoral challenge.

¹⁹ On 28 July 2013, in his address to representatives of Latin American episcopal conferences, POPE FRANCIS mentioned the clericalism of the laity: “*Clericalism* is also a temptation very present in Latin America. Curiously, in the majority of cases, it has to do with a sinful complicity: the priest clericalizes the lay person and the lay person kindly asks to be clericalized, because deep down it is easier.” Apostolic Journey to Rio de Janeiro, Address to the Leadership of the Episcopal Conferences of Latin America during the General Coordination Meeting, Sumaré Study Center, 28 July 2013, https://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-celam-rio.html (21 December 2018).

²⁰ The subtlety of some aspects of clericalism can be found in certain terms which are sometimes employed: “*raised to the priesthood*,” “*advanced to holy orders*,” “*reduced to the lay state*,” etc. Words form attitudes, which result in behaviors. Perhaps better phrases are “*ordained to the priesthood*,” “*called to holy orders*,” “*returned to the lay state*,” etc.

In a letter on 19 March 2016 to Cardinal Marc Ouelette, p.s.s., president of the Pontifical Commission for Latin America, Pope Francis reflected further on the evil of clericalism which, he says, “tends to diminish and undervalue” the baptismal grace given to all, and which “gradually extinguishes the prophetic flame” to which the Church is called.

A shepherd cannot conceive of himself without his flock, whom he is called to serve. The pastor is pastor of a people, and he serves this people from within. Many times he goes ahead to lead the way, at other times he retraces his steps lest anyone be left behind, and, not infrequently, he stands in the middle to know the pulse of the people.

...

We cannot reflect on the theme of the laity while ignoring one of the greatest distortions that Latin America has to confront—and to which I ask you to devote special attention—clericalism. This approach not only nullifies the character of Christians, but also tends to diminish and undervalue the baptismal grace that the Holy Spirit has placed in the heart of our people. Clericalism leads to homologization of the laity; treating the laity as “representative” limits the diverse initiatives and efforts and, dare I say, the necessary boldness to enable the Good News of the Gospel to be brought to all areas of the social and above all political sphere. Clericalism, far from giving impetus to various contributions and proposals, gradually extinguishes the prophetic flame to which the entire Church is called to bear witness in the heart of her peoples. Clericalism forgets that the visibility and sacramentality of the Church belong to all the People of God (cf. *Lumen gentium*, nn. 9-14), not only to the few chosen and enlightened.²¹

More recently, on 16 January 2018, Pope Francis reminded the bishops of Chile and Peru that clericalism is a “caricature of the vocation we have received.” He insisted that we must say “no” to clericalism, and he reflected on the mission of tomorrow’s priests.

Their mission is carried out in fraternal unity with the whole People of God. Side by side, supporting and encouraging the laity in a climate of discernment and synodality, two of the essential features of the priest of tomorrow. Let us say no to clericalism and to ideal worlds that are only part of our thinking, but touch the life of no one.²²

²¹ POPE FRANCIS, Letter of His Holiness, Pope Francis, to Cardinal M. Ouelette, President of the Pontifical Commission for Latin America, 19 March 2016, https://w2.vatican.va/content/francesco/en/letters/2016/documents/papa-francesco_20160319_pont-comm-america-latina.html (21 December 2018).

²² POPE FRANCIS, Apostolic Journey of his Holiness, Pope Francis, to Chile and Peru (15-22 January 2018), Meeting with the Bishops, Greeting of the Holy Father at Santiago Cathedral Sacristy, 16 January 2018, http://w2.vatican.va/content/francesco/en/speeches/2018/january/documents/papa-francesco_20180116_cile-santiago-vescovi.html (21 December 2018).

In his Letter to the Pilgrim People of God in Chile on 31 May 2018, Pope Francis said that clericalism tries to stifle the work of the Spirit in the Church.

In my experience as a pastor I learned to discover that pastoral ministry of popular devotion is one of the few places where the People of God is sovereign from the influence of that clericalism that seeks to always control and stop the anointing of God on his people.²³

In his 20 August 2018 letter to the People of God concerning the sexual abuse of minors, Pope Francis insisted that a “no” to sexual abuse is a “no” to all forms of clericalism.

It is impossible to think of a conversion of our activity as a Church that does not include the active participation of all the members of God’s People. Indeed, whenever we have tried to replace, or silence, or ignore, or reduce the People of God to small elites, we end up creating communities, projects, theological approaches, spiritualities, and structures without roots, without memory, without faces, without bodies, and, ultimately, without lives [cf. POPE FRANCIS, Letter to the Pilgrim People of God in Chile, 31 May 2018]. This is clearly seen in a peculiar way of understanding the Church’s authority, one common in many communities where sexual abuse and the abuse of power and conscience have occurred. Such is the case with clericalism, an approach that “not only nullifies the character of Christians, but also tends to diminish and undervalue the baptismal grace that the Holy Spirit has placed in the heart of our people” [cf. POPE FRANCIS, Letter to Cardinal Marc Ouellet, President of the Pontifical Commission for Latin America, 19 March 2016]. Clericalism, whether fostered by priests themselves or by lay persons, leads to an excision in the ecclesial body that supports and helps to perpetuate many of the evils that we are condemning today. To say “no” to abuse is to say an emphatic “no” to all forms of clericalism.²⁴

A few days later, near the end of his visit to the 9th World Meeting of Families, the Holy Father encouraged the Irish bishops in their pastoral tasks and urged them to be close to people who have been hurt by the “past failures—grave sins—with regard to the protection of children and vulnerable adults.” He urges them to continue to confront this painful history with humiliation. He encourages the bishops to find courage in the wounds of Christ and to avoid clericalism. “I ask you, please, to be close—this is the

²³ POPE FRANCIS, Carta al Pueblo di Dios que peregrina en Chile, 21 May 2018, http://w2.vatican.va/content/francesco/es/letters/2018/documents/papa-francesco_20180531_lettera-popolodidio-cile.html, unofficial English translation at https://www.catholicnewsagency.com/news/full-text-of-pope-francis-letter-to-the-church-in-chile-35580?utm_source=C-NA&utm_medium=email&utm_campaign=daily_newsletter (21 December 2018).

²⁴ POPE FRANCIS, Letter of His Holiness, Pope Francis, to the People of God, 20 August 2018, <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/20/0578/01246.html> (21 December 2018).

word, “closeness”—to the Lord and to God’s people. Closeness. Do not repeat the attitudes of aloofness and clericalism that at times in your history have given the real image of an authoritarian, harsh, and autocratic Church.”²⁵

During a gathering on 23 September 2018 with fellow Jesuits at the nunciature in Vilnius, Lithuania, a young Jesuit priest asked the Holy Father what “we” can do to help the Church. Pope Francis commented that clericalism is a “perversion” of today’s Church.

Thank you! I don’t know what to ask from you specifically. But what needs to be done today is to accompany the Church in a deep spiritual renewal. I believe the Lord wants a change in the Church. I have said many times that a perversion of the Church today is clericalism. But 50 years ago the Second Vatican Council said this clearly: the Church is the People of God. Read number 12 of *Lumen Gentium*. I know that the Lord wants the Council to make headway in the Church. Historians tell us that it takes 100 years for a Council to be applied. We are halfway there. So, if you want to help me, do whatever it takes to move the Council forward in the Church. And help me with your prayer. I need so many prayers.²⁶

More recently, on 3 October 2018, in his opening address at the 15th ordinary synod of bishops on young people, the faith, and vocational discernment, Pope Francis says that the “scourge” of clericalism must be “decisively overcome” since it is a “perversion” and “the root of many evils in the Church.”

It is therefore necessary ... to decisively overcome the scourge of clericalism. Listening and leaving aside stereotypes are powerful antidotes to the risk of clericalism, to which an assembly such as this is inevitably exposed, despite our intentions. Clericalism arises from an elitist and exclusivist vision of vocation, that interprets the ministry received as a *power* to be exercised rather than as a free and generous *service* to be given. This leads us to believe that we belong to a group that has all the answers and no longer needs to listen or learn anything, or that pretends to listen. *Clericalism is a perversion and is the root of many evils in the Church*: we must humbly ask forgiveness for this and above all create the conditions so that it is not repeated.²⁷

²⁵ POPE FRANCIS, Address to the Irish Bishops at the Conclusion of the IX World Meeting of Families, 26 August 2018, http://w2.vatican.va/content/francesco/en/speeches/2018/august/documents/papa-francesco_20180826_dublino-irlanda-vescovi.html (21 December 2018).

²⁶ Antonio SPADARO, “‘I Believe the Lord Wants a Change in the Church’: A Private Dialogue with the Jesuits in the Baltics,” in *La Civiltà cattolica*, 17 October 2018, <http://laciviltacattolica.com/i-believe-the-lord-wants-a-change-in-the-church-a-private-dialogue-with-the-jesuits-in-the-baltics/> (21 December 2018).

²⁷ POPE FRANCIS, Address at the Opening of the XV Ordinary Synod of Bishops on Young People, the Faith, and Vocational Discernment, 3 October 2018, http://w2.vatican.va/content/francesco/en/speeches/2018/october/documents/papa-francesco_20181003_apertura-sinodo.html (21 December 2018).

On 6 October 2018, Pope Francis authorized a communication concerning the investigation of alleged sexual abuse by an archbishop in which he says that a different treatment for bishops who have committed sexual abuse or covered it represents a kind of clericalism.

The Holy See will, in due course, make known the conclusions of the matter regarding Archbishop McCarrick.... The Holy See is conscious that, from the examination of the facts and of the circumstances, it may emerge that choices were taken that would not be consonant with a contemporary approach to such issues. However, as Pope Francis has said: “*We will follow the path of truth wherever it may lead*” (Philadelphia, 27 September 2015). Both abuse and its cover-up can no longer be tolerated and a different treatment for Bishops who have committed or covered up abuse, in fact represents a form of clericalism that is no longer acceptable.²⁸

Later the same day, in his address to those participating in the synod on youth, Pope Francis again condemned clericalism, describing it as “princely and scandalous” and calling it “one of the ugliest perversions of the Church.” He urged the young people to be “on the move” (i.e., “synodal”).

Take your path. Be young people on the move, who look to the horizons, not in the mirror. Always looking ahead, on the move, and not sitting on the sofa ... it is not looking in the mirror that lets me find myself, looking at myself as I am. Finding oneself is in doing, in going in search for good, for truth, for beauty. There I will find myself. ... Then, on this path, another word that struck me is the last one. It was powerful, that last one, but it is true... Who said it? ... You. It was strong: consistency. Consistency in life. I take a path, but with a consistent life. And when you see an inconsistent Church, a Church that reads you the Beatitudes then falls into clericalism, more princely and scandalous, I understand, I understand... If you are a

The Final Document of the 2018 Synod of Bishops refers to this opening address: “Abuse exists in various forms: abuse of power, abuse of conscience, sexual or financial abuse. Clearly, the ways of exercising authority that make all this possible have to be eradicated and the irresponsibility and lack of transparency with which so many cases have been handled have to be challenged. The desire to dominate, the lack of dialogue and transparency, forms of double life, spiritual emptiness, as well as psychological weaknesses are the ground on which corruption thrives. Clericalism, in particular, ‘arises from an elitist and exclusivist vision of vocation, that interprets the ministry received as a power to be exercised rather than as a free and generous service to be given. This leads us to believe that we belong to a group that has all the answers and no longer needs to listen or learn anything, or that pretends to listen’ (FRANCIS, Address to the 1st General Congregation of the XV General Assembly of the Synod of Bishops, 3 October 2018).” SYNOD OF BISHOPS, Final Document of the Synod of Bishops on Young People, Faith and Vocational Discernment, n. 30.

²⁸ SALA STAMPA DELLA SANTA SEDE, Comunicato della Santa Sede, 06.10.18, <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/10/06/0731/01548.html#en> (21 December 2018).

Christian, you take the Beatitudes and you put them into practice. ... Not the path of worldliness, the path of clericalism, which is one of the ugliest perversions of the Church.²⁹

Clericalism frustrates the mission of the Church because it tends to discount and dismiss the multiple gifts and fundamental Christian dignity of those missionary disciples who are not clerics. Clericalism is the antithesis of synodality.

1.4 — Synodality: A Synthesis of the Ecclesiology of Vatican Council II

The term “synodality” is not found in the documents of Vatican Council II. Nonetheless, the notion of synodality, ancient in its origin among Christians, is a term which summarizes the fundamental ecclesiology of Vatican Council II, especially emphasizing that the Church is the People of God and a communion.³⁰ The International Theological Commission writes:

Although synodality is not explicitly found as a term or as a concept in the teaching of Vatican II, it is fair to say that synodality is at the heart of the work of renewal the Council was encouraging.

The ecclesiology of the People of God stresses the common dignity and mission of all the baptised, in exercising the variety and ordered richness of their charisms, their vocations, and their ministries. In this context the concept of communion expresses the profound substance of the mystery and mission of the Church, whose source and summit is the Eucharistic synaxis [CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as*

²⁹ POPE FRANCIS, Address at Meeting of Young People with the Holy Father and the Synod Fathers, <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/10/06/181006g.html> (21 December 2018).

³⁰ Alphonse BORRAS notes three descriptions of the Church over the past half century. (1) The Church as the People of God. Vatican II focused on the Church as “the People of God,” which emphasizes God as the author of the Church, which is the Body of Christ and the Temple of the Holy Church. This acknowledges the origin of the Church. (2) The Church as *communio*. Some twenty years later, Pope John Paul II in *Christifideles laici*, 19, recalled the 1985 Synod of Bishops’ statement: “The ecclesiology of *communio* is a central and fundamental concept in the conciliar documents.” *Communio* ecclesiology focuses on the nature of the Church which participates in the life of God through diverse charisms, vocations, sensibilities, etc. This acknowledges the organic character of the Church. (3) The Church as synodal. More recently, this concept focuses on the process which builds up the Church and emphasizes the participation of the baptized in its mission in the world. This emphasizes the dynamic dimension of the Church. See “Évolutions souhaitables en matière de synodalité sur le plan des ‘instances intermédiaires’,” in Lorenzo BALDISSERI (ed.), *A cinquant’anni dall’Apostolica sollicitudo: Il Sinodo dei vescovi al servizio di una Chiesa sinodale*, Vatican City, Libreria editrice vaticana, 2016, 263-265.

Communion, 28 May 1992, which states, referring to VATICAN II (cf. *Lumen Gentium* 4, 8, 13-15, 18, 21, 24-25; *Dei Verbum* 10; *Gaudium et Spes* 32; *Unitatis Redintegratio* 2-4, 14-15, 17-19, 22) and the *Final Report of the Second Extraordinary Assembly of Bishops* in 1985 (cf. II, C, 1): “The concept of communion (*koinonia*), which appears with a certain prominence in the texts of the Second Vatican Council, is very suitable for expressing the core of the Mystery of the Church, and can certainly be a key for the renewal of Catholic ecclesiology”].³¹

The International Theological Commission mentions several themes reflecting synodality which are rooted in *Lumen gentium*.

The dogmatic Constitution *Lumen Gentium* sets out a vision of the nature and mission of the Church as communion, with the theological presuppositions of a suitable re-launch of synodality: the mystical and sacramental conception of the Church; her nature as People of God on pilgrimage through history towards the heavenly homeland, in which all her members are by virtue of baptism honoured with the same dignity as children of God and appointed to the same mission; the doctrine of sacramentality of the episcopate and collegiality in hierarchical communion with the Bishop of Rome.³²

Myriam Wijlens suggests that the Pope’s emphasis on the common synodality of *all* the faithful reflects a “new configuration,” rooted in different doctrines of Vatican Council II.

Synodality is not any longer exclusively the doctrine of collegiality of the bishops with the Pope, but it allows for and requires a participation of all the faithful in discernment and thus decision-making processes. The new configuration is rooted in different doctrines of Vatican II, such as the doctrine that the church is the People of God, that all baptized participate in the threefold ministry of Christ—and related to this is the doctrine on the charisms, the doctrine that the church as such cannot err, the doctrine concerning the collegiality of bishops and with it the relationship to the primacy of the Pope. It should be stated upfront: Pope Francis did not change any of these doctrines of Vatican II in themselves, but by placing each of them into a new relationship with each other he was able to transform the totality. In doing so he offered a new perspective in the familiar. He showed in words and deeds how the doctrines that hitherto stood side by side, unfold their deeper meaning when they are considered as mutually complementary. Not a change of doctrine, but a new understanding of the individual doctrines was

³¹ INTERNATIONAL THEOLOGICAL COMMISSION, *Synodality in the Life and Mission of the Church*, n. 6.

³² *Ibid.*, n. 40. This document adds: “In the more than fifty years that have passed since the last Council until today, the awareness of the Church as communion has grown in broad sectors of the People of God and there have been positive experiences of synodality at diocesan, regional, and universal levels” (n. 41).

made possible by looking at them as standing in an organic unity. The new configuration is ultimately not directed to decision making processes as such, but towards the higher purpose of the church and the internal ordering, namely, to proclaim the faith in Jesus Christ faithfully and effectively to the current people in their specific circumstances of life, so that it may more and more fill the hearts of people (*DV* 26)....

The reconfiguration will and should have impact on all levels of discernment and decision-making processes in the church whether they take place in the local church, that is the parish and the diocese, in groupings of local churches such as ecclesiastical provinces or the churches gathered through their bishops in an episcopal conference, or in the church universal.³³

In summary, reflecting the rich ecclesiology of Vatican Council II, “synodality” expresses the *modus essendi* and *modus agendi* of the pilgrim People of God, who live in essential *communio* as we accompany one another on the journey to the fullness of life in God. It reflects the conciliar teaching about the equal dignity and the diverse and complementary gifts of the missionary disciples, who are co-responsible for the life and mission of the Church of Christ. Synodality is an essential element of the Church and reflects its very essence. It describes who we are and what we do. “A synodal Church is a Church of participation and co-responsibility.”³⁴

Synodality is manifested constantly in the routine daily interactions of the Christian faithful (each of whom has a synodal vocation), but it is also found in synodal structures (each of which has a precise synodal focus and function). For the exercise of synodality to be effective, missionary disciples will hold four essential beliefs related to synodality: (1) that the Spirit generously bestows diverse but complementary gifts, (2) that mutual listening is essential, (3) that consultation is invaluable, and (4) that clericalism is the antithesis of synodality. These beliefs are to be reflected in real *praxis*—including in the management of ecclesiastical goods. It is the task of all missionary disciples, especially church leaders, to promote the realization of a truly synodal experience of a truly synodal Church. All are prompted to understand, appreciate, and welcome expressions of synodality throughout the Church and in all relations among the σύνδοι, the fellow travelers on the journey.

³³ Myriam WILENS, “Reforming the Church by Hitting the Reset Button: Reconfiguring Collegiality within Synodality because of *Sensus fidei fidelium*,” in *The Canonist*, 8 (2017), 236-237. See also Massimo FAGGIOLI, “From Collegiality to Synodality: Pope Francis’s Post-Vatican II Reform,” in *Commonweal*, 23 November 2018, https://www.commonweal-magazine.org/collegiality-synodality?utm_source=Main+Reader+List&utm_campaign=15fb71703a-EMAIL_CAMPAIGN_2017_03_16_COPY_01&utm_medium=email&utm_term=0407bf353a2-15fb71703a-92385081 (21 December 2018).

³⁴ INTERNATIONAL THEOLOGICAL COMMISSION, *Synodality in the Life and Mission of the Church*, n. 67.

2 — *Diocesan and Parochial Synodal Structures Which Deter Financial Malfeasance*

The 1983 Code provides for the establishment of synodal structures which deal with temporal goods within the particular Church. If these structures are working effectively and efficiently, the structures themselves deter financial malfeasance. The synodal structures at the diocesan level are the diocesan finance council, the college of consultors, and the presbyteral council. At the parochial level, the synodal structure is the parochial finance council. Inasmuch as these structures involve broad participation in the management of church property, they deter financial malfeasance. On the contrary, to the extent that these synodal structures do not perform their proper roles, the occasions for financial malfeasance increase.

Of course, these synodal structures can operate effectively only if their members are fully informed of all pertinent information, with complete transparency.³⁵ Canon 1292 §4, which concerns alienation (and which, by reason of canon 1295, also concerns acts of extraordinary administration involving “threatening contracts”), insists that persons giving counsel or consent do so only after being fully informed. Indeed, the canon *forbids* them from acting prior to full disclosure of pertinent information: “Those who by advice or consent must take part in alienating goods are not to offer advice or consent unless they have first been thoroughly informed both of the economic state of the juridic person whose goods are proposed for alienation and of previous alienations.”

Further, one may recall the norm of canon 127 §2, 2°, which concerns individuals offering counsel to a superior. The canon proposes that a superior accept the counsel offered, especially if the counsel is unanimous, unless there is an overriding contrary reason: “[I]f counsel is required, the act of a superior who does not hear those persons is invalid; although not obliged to accept their opinions even if unanimous, a superior is nonetheless not to act contrary to that opinion, especially if unanimous, without a reason which is overriding in the superior’s judgment.” This canon proposes that counsel from individuals or groups, such as synodal structures, be taken seriously, and it expects that a superior will have an overriding reason not to accept counsel, especially if it is unanimous. Indeed, the spirit of this canon would also invite the superior to offer the rationale for non-acceptance of the counsel which persons have offered in good faith and after serious reflection.

³⁵ See Alberto PERLASCA, “Trasparenza e riservatezza nella gestione dei beni ecclesiastici,” in *Periodica*, 107 (2018), 493-512.

Such an explanation reflects healthy adult behavior which one should expect to find anywhere, particularly in the Church of which synodality (always involving mutual listening and honest speaking, and extolling the important role of consultation) is a constitutive element.

2.1 — Diocesan Financial Synodal Structures

At the diocesan level, there are three synodal structures which relate to temporal goods: the diocesan finance council, the college of consultors, and the presbyteral council.³⁶ The effective operation of these structures deters against financial malfeasance.

2.1.1 — *The Diocesan Finance Council*

To be established within every diocesan curia (see cc. 469-494) is the diocesan finance council. It is not optional.³⁷ It is established according to the norm of canons 492-493.

Canon 492 — §1. In every diocese a finance council is to be established, over which the diocesan bishop himself or his delegate presides and which consists of at least three members of the Christian faithful truly expert in financial affairs and civil law, outstanding in integrity, and appointed by the bishop.
 §2. Members of the finance council are to be appointed for five years, but at the end of this period they can be appointed for other five year terms.

³⁶ The Directory for the Pastoral Ministry of Bishops promotes the involvement of these three groups and the *diocesan pastoral council* (cf. below, our section 2.1.4 — *Addendum: Diocesan Pastoral Council*) in matters pertaining to the management of diocesan finances. “The financial administration of the diocese [should be entrusted] to individuals who are competent as well as honest, so that it can become an example of transparency for other similar church institutions” [JOHN PAUL II, post-synodal apostolic exhortation *Pastores gregis*, n. 4]. The Bishop, in fact, must seek the collaboration of the college of consultors and the finance council in those matters determined by the universal law of the Church [cf. c. 1277 and also the following canons: 494 §§1-2; 1263; 1281 §2; 1987 §2; 1292; 1295; 1304; 1305; 1310 §2] when prudence so dictates, because of the importance of the case or its particular circumstances.... The Bishop should involve the diocesan clergy, through the presbyteral council, in the important financial decisions that he wishes to make, and he should seek their opinion in such matters [cf. c. 500 §2]. In certain cases, it may also be helpful to consult the diocesan pastoral council.” *Apostolorum successores*, n. 189 a-b.

³⁷ Canon 1280 gives juridic persons the option of either a finance council or at least two financial counselors: “Each juridic person is to have its own finance council or at least two counselors who, according to the norm of the statutes, are to assist the administrator in performing his or her function.” However, dioceses (c. 492 §1) and parishes (c. 537) do not have the option of having two or more financial counselors instead of a finance council.

§3. Persons who are related to the bishop up to the fourth degree of consanguinity or affinity are excluded from the finance council.

Canon 493 — In addition to the functions entrusted to it in Book V, The Temporal Goods of the Church, the finance council prepares each year, according to the directions of the diocesan bishop, a budget of the income and expenditures which are foreseen for the entire governance of the diocese in the coming year and at the end of the year examines an account of the revenues and expenses.

The diocesan finance council has four routine functions:

1. to prepare an annual diocesan budget of foreseen income and expenditures (c. 493);³⁸
2. to examine the annual diocesan report of revenue and expenses (c. 493; see c. 494 §4);
3. to review the annual financial reports presented by administrators of any ecclesiastical goods not legitimately exempt from the power of governance of the diocesan bishop (e.g., parochial goods), after the administrators have submitted these to the local ordinary (c. 1287 §1);
4. to elect a temporary diocesan finance officer if the diocesan finance officer is elected the diocesan administrator *sede vacante* (c. 423 §2).

In addition, the diocesan bishop must receive the *consent* of the diocesan finance council before he can perform the following three actions validly:

1. to place acts of extraordinary diocesan administration as defined by the conference of bishops (c. 1277; the college of consultors must also give consent);
2. to give permission to alienate the stable patrimony of public juridic persons subject to his authority, and to alienate diocesan stable patrimony, if its value exceeds the minimum amount established by the conference of bishops (c. 1292 §2; the college of consultors and “those concerned” must also give consent);
3. to give permission to enter “threatening contracts” involving the stable patrimony of public juridic persons subject to his authority or involving diocesan stable patrimony if its value exceeds the minimum amount established by the conference of bishops (c. 1295; the college of consultors and “those concerned” must also give their consent; see c. 1292 §2).

³⁸ The Code requires an annual diocesan budget, something which it strongly recommends (*enixe commendatur*) to be required by particular law for other juridic persons (c. 1284 §2).

Further, the diocesan bishop must receive the *counsel* of the diocesan finance council before he is able to perform seven acts validly:

1. to appoint and to remove the diocesan finance officer (c. 494 §§2-3; the college of consultors must also give its counsel);
2. to impose an ordinary diocesan tax upon public juridic persons subject to his authority (c. 1263; the presbyteral council must also give its counsel);
3. to impose an extraordinary diocesan tax upon other juridic persons and upon physical persons subject to his authority (c. 1263; the presbyteral council must also give its counsel);
4. to place acts of ordinary diocesan administration which are more important in light of the economic condition of the diocese (c. 1277; the college of consultors must also give its counsel);
5. to determine acts of extraordinary administration for public juridic persons subject to him (c. 1281 §1);
6. to make a prudent judgment on the investment of money and movable goods assigned to an endowment for the benefit of a foundation (c. 1305);
7. to lessen equitably the obligations attached to a foundation (but not foundation Masses) if, through no fault of the administrator, the fulfillment of these obligations is impossible due to diminished revenue or some other cause (c. 1310 §2; “those concerned” must also give their counsel).

Diocesan particular law can assign other functions to the diocesan finance council which reflect its service as a synodal structure assisting in the management of temporal goods by the diocesan bishop. Among these tasks could be:

1. to review regularly updated inventories of the diocese, parishes, and other public juridic persons subject to the diocesan bishop (see c. 1283, 2°-3°);
2. to review annual budgets presented by parishes and other public juridic persons subject to the diocesan bishop (see c. 1284 §3);
3. to offer counsel to the diocesan bishop before he performs acts of extraordinary acquisition, retention, and alienation (below the amount established by the conference of bishops), including acts which are “more important in light of the economic condition of the diocese” (see c. 1277, which concerns such acts of *administration* only);

4. to offer counsel to the diocesan bishop about requests from parishes and other public juridic persons which seek to perform acts of extraordinary acquisition, retention, administration, and alienation (below the amount established by the conference of bishops);
5. to review proposed diocesan particular law³⁹ and special instructions (see c. 1276 §2)⁴⁰ concerning temporal goods, before they are issued by the diocesan bishop;
6. to review audits of the diocese, parishes, and other public juridic persons subject to the diocesan bishop;
7. to review contacts entered by the diocese, parishes, and other public juridic persons subject to the diocesan bishop (see cc. 1290; 22), including in matters of employment (see c. 1286);
8. to advise the diocesan bishop in the handling of alleged financial malfeasance by administrators of parishes and other public juridic persons to him, including in matters of alleged ecclesiastical delicts involving finances (see cc. 1389, 1375, 1377, 1380, 1385, 1386; also 1368, 1391, 1399).⁴¹

2.1.2 — *The Presbyteral Council*

To be established within every diocese is the presbyteral council. It is not optional. Its establishment and purpose are explained in canon 495 §1: “In each diocese a presbyteral council is to be established, that is, a group of priests (*sacerdotes*) which, representing the presbyterate, is to be like a senate of the bishop and which assists the bishop in the governance of the diocese according to the norm of law to promote as much as possible the pastoral good of the portion of the people of God entrusted to him.” The diocesan bishop is to hear the presbyteral council in matters of greater importance (*in negotiis maioris momenti*: c. 500 §2), and he must receive its *counsel* before he can perform the following eight acts validly:

1. to convoke a diocesan synod (c. 461 §1);
2. to establish, suppress, or notably alter parishes (c. 515 §2);

³⁹ See John A. RENKEN, “Particular Law on Temporal Goods,” in *Studies in Church Law*, 4 (2008), 447-454.

⁴⁰ See John A. RENKEN, “The *Parochus* as the Administrator of Parish Property,” in *Studia canonica*, 43 (2009), 516-518. See also Mary Judith O’BRIEN, “Instructions for Parochial Temporal Administration,” in *Catholic Lawyer*, 41 (2001), 121-123.

⁴¹ See John A. RENKEN, “Penal Law and Financial Malfeasance,” in *Studia canonica*, 42 (2008), 5-57.

3. to allocate offerings made by the faithful for parochial services and to remunerate the clerics who perform them (c. 531; see c. 551);
4. to mandate a pastoral council in each parish (c. 536 §1);
5. to erect a new church building (c. 1215 §2);
6. to relegate a church to profane but not sordid use (c. 1222 §2);
7. to impose the ordinary and extraordinary diocesan tax (c. 1263);
8. to establish a group of priests whom the diocesan bishop will consult in removing or transferring an unwilling pastor (c. 1742 §1, 1745, 2°, 1750); this removal may be for his “poor administration of temporal goods with grave harm to the Church whenever another remedy to this harm cannot be found” (c. 1741, 5°).

2.1.3 — *The College of Consultors*

Each diocese must establish a college of consultors. It is not optional. Its establishment and purpose are explained in canon 502 §1: “From among the members of the presbyteral council and in a number not less than six nor more than twelve, the diocesan bishop freely appoints some priests (*sacerdotes*) who are to constitute for five years a college of consultors, to which belongs the functions determined by the law.” The college of consultors performs significant roles when the see is impeded⁴² or vacant⁴³ and when a new bishop is appointed.⁴⁴ More commonly, however, the college of consultors assists the diocesan bishop in the care of temporal goods. Thus, the diocesan bishop must receive the *consent* of the college of consultors before he can perform three actions validly:

1. to place acts of extraordinary administration as defined by the conference of bishops (c. 1277; the diocesan finance council must also give its consent);
2. to give permission to alienate the stable patrimony of public juridic persons subject to his authority, and to alienate diocesan stable patrimony, if its value exceeds the minimum amount established by the conference of bishops (c. 1292 §2; the diocesan finance council and “those concerned” must also give their consent);
3. to give permission to enter “threatening contracts” involving the stable patrimony of public juridic persons subject to his authority or involving

⁴² See canon 413 §3.

⁴³ See canons 421 §1; 419; 422; see canons 272; 485; 1018 §1, 2°.

⁴⁴ See canons 382 §2; 404 §1; 404 §3; see canon 377 §3.

diocesan stable patrimony if its value exceeds the minimum amount established by the conference of bishops (c. 1295; the diocesan finance council and “those concerned” must also give their consent; see c. 1292 §2).

Further, the diocesan bishop must receive the *counsel* of the college of consultors before he is able to perform three acts validly:

1. to appoint the diocesan finance officer (c. 494 §1);
2. to remove the diocesan finance officer during his or her five-year term (c. 494 §2);
3. to place “non-routine” acts of administration of diocesan ecclesiastical goods which are more important in light of the economic condition of the diocese (c. 1277).

2.1.4 — Addendum: Diocesan Pastoral Council

In addition to the three structures discussed above, the Directory for the Pastoral Ministry of Bishops states: “In certain cases [involving important financial decisions], it may also be helpful to consult the diocesan pastoral council.”⁴⁵ Yet, it is understood that such involvement in financial affairs is exceptional because the purpose of the diocesan pastoral council is “pastoral planning,”⁴⁶ and the common involvement in diocesan financial affairs is assigned by the Code to other diocesan structures of synodality, as outlined above. Arguably, what is said about the diocesan pastoral council’s occasional involvement in diocesan-level financial decisions would also pertain to the occasional involvement of the parochial pastoral council in parochial-level financial decisions. Too frequent an involvement of pastoral councils (diocesan and parochial) in financial affairs has the risk of confusing the proper *raison d’être* of the other synodal structures with an immediate and clear role in financial affairs.

⁴⁵ *Apostolorum successores*, n. 189b.

⁴⁶ Canon 511 states: “In every diocese and to the extent that pastoral circumstances suggest it, a pastoral council is to be constituted which under the authority of the bishop investigates, considers, and proposes practical conclusions about those things which pertain to pastoral works in the diocese.” This canon assigns three tasks to the diocesan pastoral council: (1) to investigate diocesan pastoral issues; (2) to study them; and (3) to propose practical recommendations about them. *This is pastoral planning*. These same tasks, logically, pertain to the parish pastoral council (see c. 536 §1).

2.2 — Parochial Financial Synodal Structure

The Code requires that in every parish there is to be a parochial finance council. It is not optional.⁴⁷ Canon 537 states: “In each parish there is to be a finance council which is governed, in addition to universal law, by norms issued by the diocesan bishop and in which the Christian faithful, selected according to these same norms, are to assist the *parochus* in the administration of the goods of the parish, without prejudice to the prescript of canon 532.” Canon 532 says that the *parochus* is the legal representative of the parish and “is to take care that the goods of the parish are administered according to the norm of canons 1281-1288.” Indeed, the role of the *parochus* is to care for all aspects of parochial temporal goods (i.e., their acquisition, retention, administration, and alienation (cc. 1254 §1; 1255); therefore, the reference in canon 532 only to canons 1281-1288 is an imprecise limitation of the function of the *parochus*.⁴⁸

Canon 532 requires that diocesan particular law determine the specific membership and identify the specific roles of the parochial finance council. Certainly, the council’s roles will involve all four aspects of the Church’s relation to temporal goods (i.e., acquisition, retention, administration, and alienation, cc. 1254 §1; 1255). These roles will clearly reflect that the *parochus* alone is the administrator (c. 118) of the public juridic person of the parish (c. 515 §3).⁴⁹

Diocesan particular law on parochial finance councils⁵⁰ will address issues which will assist in their smooth, competent, and transparent functioning, including:

- name
- purpose
- definitions

⁴⁷ See note 34 *supra*.

⁴⁸ See Francisco COCCOPALMERIO, *De paroecia*, Rome, Editrice Pontificia Università Gregoriana, 1991, 204.

⁴⁹ Canon 537 first appeared in the 1980 *Schema*; it did not exist in the 1977 *Schema de populo Dei*. On 14 May 1980, the *coetus De populo Dei* had considered that parochial goods be administered by the parochial finance council together with the *parochus* who presides at its meetings. Upon further reflection, the *coetus* formulated the proposed canon, which appeared as canon 476 in the 1980 *Schema*, whereby parochial property is administered by the *parochus* alone, who receives the assistance of the parochial finance council. *Communicationes*, 13 (1980), 307-308.

⁵⁰ See Kevin M. McDONOUGH, “The Diocesan and Pastoral Finance Council,” in Kevin E. McKENNA, Lawrence A. DiNARDO, and Joseph W. POKUSA (eds.), *Church Finance Handbook*, Washington, D.C., CLSA, 1999, 145-149.

- members: terms (and their ability to be renewed), qualifications, formation, removal
- council leaders and their roles (the *parochus* must be its president)
- frequency of meetings
- specific functions in relation to specific acts of acquisition, retention, administration, and alienation of parochial goods (with a particular identification of the council's role in acts of the “extraordinary”)
- committees (standing and *ad hoc*)
- quorum and voting
- amendments
- communications with parishioners (e.g., dissemination of agenda, minutes, etc.)
- effective date

The parochial finance council is a synodal structure in the parish which assists the *parochus* in the management of the temporal goods of the parish. Possible tasks assigned by diocesan particular law to the parish finance council may include the following, *inter alia*:

1. to review annual financial reports presented to the local ordinary, for review by the diocesan finance council (c. 1287 §1; see c. 493);
2. to review regularly updated inventories to be presented to the diocesan bishop (see c. 1283, 2°-3°);
3. to review annual parochial budgets to be presented to the diocesan bishop (see c. 1284 §3; see c. 493);
4. to ensure the implementation of diocesan particular law and special instructions concerning temporal goods;
5. to review parochial financial audits;
6. to review parochial employment policies (see c. 1286);
7. to review all contracts (see cc. 1290; 22), including in matters of employment (see c. 1286);
8. to assist the *parochus* in all (significant) aspects of his acts of acquisition, retention, administration, and alienation;
9. to offer counsel before the *parochus* performs acts of extraordinary acquisition, retention, administration, and alienation.

Attestations by means of the signatures of the members of parochial finance councils to having performed these tasks should be maintained. Indeed, these signatures should be placed on any document presented to the

diocesan bishop, with an attestation of the signatories about the authenticity and the accuracy of the document concerning issues they have studied personally and carefully.

3 — *Synodal Practices within the “Synodal Church” Which Deter Financial Malfeasance*

As mentioned already, Pope Francis teaches that synodality is a “constitutive element of the Church” (*dimensione costitutiva della Chiesa*). He insists that “God expects the Church of the third millennium” to be synodal. Synodality is not optional. It is an easy concept to put into words, but not so easy to put into practice.” In its broadest and real sense, synodality explains that the missionary disciples are accompanying each other to the fullness of life in the Kingdom of God. This common and catholic synodality is our fundamental way of being (*modus essendi*) which is reflected in our constant way of acting (*modus agendi*). Accompaniment describes the living interaction of the followers of Jesus in every circumstance.

Synodality is expressed commonly and constantly, practically and properly, in all our interactions as missionary disciples, including in the life of our dioceses and our parishes. It reminds us that all the gifted People of God are co-responsible in continuing the mission of Jesus in every time and place. It invites mutual, honest speaking (transparency) and mutual, careful listening (which is more than merely hearing). Indeed, within the diocesan and parochial community, most expressions and experiences of synodality are found in routine and daily diocesan and parochial interactions, not in the occasional gatherings of diocesan and parochial synodal structures. Synodality invites the involvement of missionary disciples in the care of diocesan and parochial property, both in formal synodal structures but, most commonly, in routine daily interactions in the diocese and the parish. The exercise of synodality in the care of diocesan and parochial property involves the entire community of missionary disciples.

The generosity of missionary disciples sustains the diocese and the parish. The faithful have the right (c. 1261 §1) and obligation (c. 1261 §2) to support their diocese and their parish.⁵¹ Like any donor, they have the right to have

⁵¹ The Directory for the Pastoral Ministry of Bishops explains: “In an appropriate manner, the Bishop will see to it that the faithful are educated to play their part in the support of the Church as active and responsible members. In this way, all will feel personally involved in the Church’s activity and its charitable works and will gladly cooperate in the just

their intentions followed (c. 1267 §3).⁵² Unless there are uncommon circumstances, they have the implicit right of having their donations accepted (c. 1267 §2).

Within the diocese and the parish, various common and routine “synodal practices” can deter financial malfeasance. These practices embody the synodal spirit. They involve transparency and openness in the exchange of information related to diocesan and parochial finances. They offer the occasion for fellow missionary disciples to ask questions and to make suggestions about this information. They reflect the faith that many diverse gifts are bestowed by the Spirit among the missionary disciples in financial matters. They also reflect the fact that the temporal goods belong to public juridic persons (scil., the diocese or the parish), and they are not the personal possessions of the administrators of those public juridic persons (scil., the diocesan bishop or the *parochus*).

3.1 — Broad and Continuous Formation to Safeguard Finances

Perhaps most basic to the involvement of missionary disciples in the safeguarding of church property against financial malfeasance is broad and ongoing formation about the synodal nature of the Church as well as financial management and malfeasance. While this formation will certainly enrich those who collaborate closely in the care of diocesan and parochial finances, the formation is not limited to them. Rather, a broadly-based and ongoing formation about the synodal nature of the Church and about safeguarding all

administration of goods [cf. cc. 222 §1; 1261 §2; JOHN PAUL II, post-synodal apostolic exhortation *Pastores gregis*, n. 45]. In order to make provision for the Church’s needs, the Bishop encourages the faithful to manifest their generosity through *offerings and almsgiving*, according to the norms issued by the Episcopal Conference [cf. 1262; 1265 §2]. He also has the right: to impose a moderate *tax*, duly observing the canonical conditions [cf. cc. 1262; 1263]; to establish special *collections* for the needs of the Church, when it is appropriate [cf. c. 1266]; to issue norms concerning the *allocation of offerings* received from the faithful during liturgical functions and also concerning the remuneration of the priests who fulfil these functions [cf. c. 531].... Finally, the Bishop should take opportunities to educate and inform the faithful on the meaning of Mass *offerings* and offerings given on the occasion of the administration of sacraments and sacramentals, with reference to the ordering of worship, the support of sacred ministers, and charity towards the poor. He should instruct the clergy to avoid in this area any undue attachment to worldly goods [cf. VATICAN II, *Presbyterorum ordinis*, nn. 20-21; cc. 1264, §2; 952; CONGREGATION FOR THE CLERGY, decree *Mos igitur*, 1991].” *Apostolorum successores*, n. 191.

⁵² The intention of the donor is highlighted in several canons: 121; 122; 123; 326 §2; 531; 616 §1; 706, 3°; 954; 1267 §3; 1284 §2, 3°-4°; 1300; 1302 §1; 1303 §2; 1304 §1; 1307 §1; and 1310 §2.

church property must be offered to all missionary disciples.⁵³ Formation about the synodal nature should include the elements already presented above. Formation about financial safeguarding should explain at least the following: (1) the canonical and civil law requirements in financial management of ecclesiastical goods; (2) the necessity of open dialogue and transparency among the gifted missionary disciples in all matters, including finances; and (3) the truth that financial malfeasance occurs all too frequently at all levels of the Church, at times even by persons considered most trustworthy and competent, thereby destroying trust and compromising seriously the effectiveness of the Church's mission.

Every available means must be employed to provide this safeguarding formation. Such means include: (1) regularly updated dissemination of information in diocesan/parochial instruments of communication, such as bulletins, newspapers, websites; (2) workshops for all the missionary disciples; (3) frequent and full transparency in all kinds of the public and secular media concerning actions taken by the Church to ensure safeguarding of church property, etc. Further, formation in safeguarding would also promote an awareness that missionary disciples are stewards of God's many blessings who are privileged to be able to share their gifts with the Church — universal, national, diocesan, parochial.

3.2 — Regular, Complete, and Transparent Financial Reporting to Missionary Disciples

The regular, complete, and transparent financial reporting by the administrators of public juridic persons (i.e., by the diocesan bishop and the *parochus*) is a synodal practice in the “synodal Church.” It allows the missionary disciples to be aware of the financial condition of the diocese and the parish. Canon 1287 §2 expects particular law to address such reporting: “According to norms to be determined by particular law, administrators are to render an account to the faithful concerning the goods offered by the faithful to the Church.”⁵⁴ On 13 November 1979, when considering comments offered on the 1977 *Schema*, the *coetus De bonis Ecclesiae temporalibus*, which drafted canon 1287, rejected the suggestion that financial reports disclose all details of the financial state of a public juridic person, even though such a practice can be praiseworthy. The reluctance was rooted in the belief that such disclosure is sometimes more difficult, unless the faithful think with the Church

⁵³ *Apostolorum successores*, n. 191.

⁵⁴ See John A. RENKEN, *Church Property*, 235-236.

(*cum Ecclesia sentient*) and are well informed on the purposes for which the Church possesses temporal goods.⁵⁵ Nonetheless, particular law can and *should* require regular and complete disclosure of diocesan⁵⁶ and parochial finances, displayed in a transparent fashion so that the information is easily understood. The Directory for the Pastoral Ministry of Bishops proposes:

It is opportune, moreover, that the diocesan community be kept informed concerning the financial condition of the diocese. Therefore, unless in a special case prudence suggests otherwise, the Bishop will see to the publication of the *financial reports* at the end of every year and at the end of diocesan projects. Likewise, parishes and other institutions could do the same under the Bishop's oversight.⁵⁷

For the reporting period, these financial reports should provide information on all income and expenses; investments of every kind; acts of extraordinary acquisition, extraordinary retention, extraordinary administration, and extraordinary alienation, etc. In addition, it seems appropriate that other reports of other matters involving the safeguarding and management of temporal goods also be regularly available — e.g., agenda and minutes of meetings of diocesan/parochial finance councils and other groups which manage church property; annual budgets (see cc. 493; 1284 §3); regularly updated inventories (see c. 1283, 2°-3°), etc. *All* these reports can easily be displayed on diocesan and parochial websites, where they can be regularly updated. Such reporting would be done annually, it would seem, but could also be done monthly or quarterly. Many parishes even report weekly income and expenses.

3.3 — Financial Audits of Dioceses and Parishes

The (local) ordinary has the responsibility “to exercise careful vigilance over the administration of all the goods which belong to public juridic persons subject to him” (c. 1276 §1), a task which “the diocesan bishop can entrust to the [diocesan] finance officer” (c. 1278). One means of fulfilling this responsibility over temporal goods is through financial audits of dioceses and parishes.⁵⁸ Such audits will involve several missionary disciples, who offer their service with transparent and open dialogue within the synodal

⁵⁵ *Communicationes*, 12 (1980), 420-421.

⁵⁶ See USCCB “Resolution on Diocesan Financial Reporting, November 2016,” <http://www.usccb.org/about/financial-reporting/diocesan-financial-reporting.cfm> (21 December 2018).

⁵⁷ *Apostolorum successores*, n. 189a.

⁵⁸ See USCCB, AD HOC COMMITTEE ON DIOCESAN AUDITS, “Report to the Body of Bishops by Most Rev. Daniel F. WALSH, Chairman, 12 November 2007,” <http://www.usccb.org/about/financial-reporting/upload/Report-20to-20Bishops-20Nov-2007.pdf> (21 December 2018).

Church. The audits should be thorough, studying all accounts (including investments) and identifying the observance of all currently operative laws, instructions, and “best practices” mandated in the diocese. They are intended to safeguard diocesan and parochial patrimony and to encourage responsible management of church property.

Financial audits can be regularly scheduled (e.g., biannually). They can also be “spontaneous”—occurring without advance announcement. Through an external auditing agent, financial audits can be arranged on a random basis for parishes and also for the diocese (neither of which would not know in advance when such a spontaneous audit will occur). Certainly, non-spontaneous financial audits should be made whenever there is a change in leadership at the diocesan level (e.g., new diocesan bishop, new diocesan finance officer) and at the parochial level (e.g., new *parochus* or equivalent).

It seems reasonable that the cost of these audits be assumed as an ordinary operating expense of the diocese. The conclusions of each diocesan financial audit could be made to the metropolitan (with the audit of the metropolitan’s see being made to the suffragan bishop senior in promotion: see cc. 395 §4; 415; 421 §2; 425 §3; 501 §3), and of each parochial financial audit to the diocesan bishop, for subsequent review by the diocesan finance council (cf. c. 1287 §1). The conclusions of the audit and those who review the audit should be disseminated publicly in the interests of transparency.

3.4 — Compilation, Implementation, and On-going Revision of “Best Practices”

Over the past several years, numerous “best practices” have developed which intend to ensure the safeguarding and management of church property, particularly in parishes.⁵⁹ These practices reflect the synodal nature of the Church. Without doubt, such a listing of best practices will continue to be enlarged. Some best practices, which invite the participation of the

⁵⁹ Among others, see USCCB, “Diocesan Financial Management (A Guide to Best Practices),” revised March 2018, <http://www.usccb.org/about/financial-reporting/upload/diocesan-financial-management.pdf> (21 December 2018); Charles E. ZECH, Mary L. GAUTIER, Robert J. MILLER, and Mary E. BENDYNA, RSM, *Best Practices of Catholic Pastoral and Finance Councils*, Huntington, Indiana, Our Sunday Visitor, 2010; Robert WEST and Charles E. ZECH, “Internal Financial Controls in the U.S. Catholic Church,” <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.499.4316&rep=rep1&type=pdf> (21 December 2018).

missionary disciples in our synodal Church, may include the following, *inter alia*:

- protocols for those who handle finances (whatever the instrument: cash, checks, etc.)
 - secretaries
 - business managers
 - money counters
 - ushers who receive offerings during Mass;
- protocols encouraging the faithful to report even the suspicion of financial malfeasance (“whistleblower policies”);
- protocols promoting transparency;
 - protocols to receive information about finances on an “as desired” basis
 - open “town hall” meetings to disclose and to discuss diocesan and parochial finances
 - identification of contact information of the members of diocesan and parochial finance councils on websites (so that members can be contacted by interested persons);
- protocols on collaboration between pastoral councils and finance councils (and other groups involving finances and pastoral planning);
- protocols for “parochial business managers” who collaborate with *parochi*.

The expansion, development, and the revision of such synodal best practices will continue as experiences suggest new and better approaches to financial management in the synodal Church.

Conclusion

A synodal approach to the management of church finances and property involves the collaboration of many. First, it requires the recognition and acceptance of the teaching that the missionary disciples constitute a synodal Church in keeping with the divine plan. Second, it requires full transparency and complete disclosure. This transparency and disclosure welcome candid discussions, fruitful dialogue, and attentive listening. They require the accountability of those charged with management of church property. They invite all the missionary disciples, who accompany one another on a common path as σύνοδοι, to share responsibility for the property of the synodal Church.

As the missionary disciples experience a more synodal approach to the management of the property of the synodal Church, there will be fewer occasions of financial malfeasance and a much more secure safeguarding of church property to further the mission of the Church (c. 1261 §1)—a mission which is realized in divine worship, support of ministers, and apostolic and charitable works, especially towards the needy (c. 1254 §1).

**UNIVERSITÉ SAINT-PAUL —
FACULTÉ DE DROIT CANONIQUE
SAINT PAUL UNIVERSITY —
FACULTY OF CANON LAW**

**THÈSES DE DOCTORAT —
DOCTORAL THESES
2018**

**EDAYE, Pierre, L'exercice du gouvernement épiscopal dans l'Église :
Cinq ans d'orientations canoniques et pastorales à partir de la vision
du Pape François.** Soutenue 14 mai 2018. Directeur de Thèse : Profes-
seur Anne Asselin.

Aussitôt après son élection, le pape François a commencé par surprendre le monde et l'Église par ses paroles et ses actes empreints de simplicité et de réalisme. On se rappelle sa première parole à la Place saint Pierre le soir du 13 mars 2013, « Bonsoir ». On se rappelle la première requête qu'il adressa au peuple de Dieu avant de donner la bénédiction *Urbi et Orbi*, « priez pour moi ». Le ton était donné pour une façon de faire et de penser dans laquelle François veut embarquer toute l'Église. Elle est appelée, cette Église, à penser autrement, à faire autrement et à être autrement. Les maîtres-mots sont : Église en sortie, disciples-missionnaires, Église pauvre pour les pauvres, périphéries existentielles, miséricorde, synodalité, œcuménisme, réforme de la curie romaine, conversion de la papauté et de l'épiscopat. De façon certaine, François s'inscrit dans la dynamique d'une réforme de l'Église qui ne laissera pas de côté la question de l'exercice du gouvernement dans l'Église.

Ce travail de recherche est un effort de relecture des textes et des paroles de François afin d'identifier sa vision pour la mission et le gouvernement de l'Église et d'en tirer quelques orientations canoniques et pastorales. Pour parvenir à cette fin, il convenait de faire un état des lieux du système de gouvernement de l'Église sur la base des éléments ecclésiologiques issus du deuxième Concile du Vatican. L'étude a montré qu'un effort d'approfondissement des enseignements du deuxième Concile du Vatican fait son chemin et aussi qu'une nouvelle

ecclésiologie est élaborée, celle du peuple fidèle de Dieu en marche. Elle permet de valoriser les Églises particulières et leurs pasteurs pour la promotion d'une pastorale de proximité, de reconnaître le rôle indéniable de tous les membres de l'Église ainsi que l'importance de leurs différents charismes dans la mission de l'Église. La structure pyramidale de l'Église ainsi que l'ecclésiologie universaliste qui la soutenait se déconstruit pour une structure ecclésiale polyédrique et synodale. Le gouvernement de l'Église sera en conséquence synodal pour une meilleure intégration de la synodalité, de la collégialité, de la primauté, et des principes de participation, de collaboration et de coresponsabilité. Le droit canonique devra s'adapter à cette nouvelle vision et subir une mise à jour.

MADDINENI, C.Ss.R., Sarath Chandra Sagar, Explicit and Implicit Rights Common to All the Faithful in the Code of Canon Law. Defended 9 November 2018. Supervisor of the Thesis: Professeur John M. Huels.

This study identifies and analyses the explicit and implicit rights in the *Code of Canon Law* that are common to all the faithful, that is, the canonical rights of all the *christifideles* and, in particular, the Catholic faithful. Excluded, therefore, is a consideration of the special rights of particular groups of the faithful such as the laity, clerics, religious, office holders, married persons, etc. Although the focus of the thesis is on the canons of the Latin Code, the counterpart canons of the *Code of Canons of the Eastern Churches* are always noted when they exist.

Explicit rights in canon law are indicated by the word *ius* or a synonym of same. An implicit right has no explicit terminology indicating a right, but the right is implied in the meaning of the law. Mostly, such rights are implied in the legal obligations of office holders and ministers. That they are obliged by law to do something for the benefit of the faithful implies a concomitant right of the faithful that it be done. Other requirements of the law may also give rise to implicit rights. These can only be known by a careful study and interpretation of the law considered in text and context. There are also certain Latin grammatical expressions commonly used in canon law for obligations or other requirements of law, and frequently these are indicators of an implied right.

NKOUAYA MBANDJI, S.J., Valère, La prescription en droit canonique et dans la tradition du Code de Napoléon avec applications particulières aux délits les plus graves touchant aux mœurs. Soutenue 27 août 2018. Directeur de Thèse : Professeur John Huels.

Le c. 22 du *CIC/83* canonise les « lois civiles auxquelles renvoie le droit de l'Église ». C'est dans cette optique que le législateur reconnaît, sauf

exceptions établies par le Code, la prescription telle qu'elle existe dans la législation civile de chaque nation (c. 197-199). Cependant, les délais de prescription des actions criminelles et pénales des cc. 1362 et 1363 et particulièrement celles des « délits les plus graves » contre les mœurs visées par le motu proprio *Sacramentorum sanctitatis tutela* du 30 avril 2001 et sa version rénovée du 21 mai 2010 sont déterminés par le législateur canonique.

L'application des délais de prescription criminelle dans les cas des « délits les plus graves » pose un problème de justice et d'équité. Quelles sont les raisons qui ont justifié son établissement et son maintien ? La prescription criminelle canonique est-elle opportune lorsqu'il s'agit des délits contre les personnes et plus particulièrement des « *delicta graviora contra mores* » commis par des clercs et des religieux sur des personnes mineures ? A cette question principale, cette thèse envisage aussi celle de l'harmonisation du système de la prescription criminelle canonique avec le régime de la prescription des juridictions séculières en matière de délits sexuels sur des mineurs.

Pour répondre à ces questions, le premier chapitre présente le développement de l'institution juridique de la prescription dans la tradition du droit civil et détermine les raisons de son institution. Le deuxième chapitre expose la notion de prescription dans la tradition canonique. Le troisième chapitre applique les normes canoniques sur la prescription aux délits les plus graves touchant aux mœurs tout en les comparant aux principes parallèles du droit séculier hérité de la tradition du code Napoléon. La question principale de cette thèse trouve une réponse au quatrième et dernier chapitre.

RECENSIONS — BOOK REVIEWS

ARAKKAL, Kurian, *Conferences and Synods in the Indian Church*, Kanonistische Reihe 29, Sankt Ottilien, EOS Verlag, 2018, xix, 355 p. — ISBN 978-3-8306-7901-1 — € 29,95

This most recent volume in the Kanonistische Reihe series of monographs offers an introduction to the ecclesiastical environment in the Indian Subcontinent where three Churches *sui iuris* coexist and have developed their respective juridical structures. Because of this ecclesial plurality, to say nothing of the presence of Eastern non-Catholic Christians, inter-ecclesial activity has been a central part of the Catholic Church in India.

Arakkal's work is divided into four chapters. The first chapter provides a useful introduction to the Christianization of India and the historical development of the respective Churches *sui iuris*. This is a useful resource that gathers together numerous sources for those who may not be familiar with this history. The second chapter focuses on the institution of the conference of bishops in general and the Conference of Catholic Bishops of India (CCBI) in particular. Arakkal examines the development of the conference of bishops from the pre-conciliar period into the current law of the Church. An examination of the current *ius vigens* is undertaken and considers recent developments such as the *motu proprio Apostolos suos*. Finally, this second chapter examines the statutes of the CCBI in particular. The third chapter examines the two structures particular to the Catholic Eastern Churches *sui iuris* of India: the Syro-Malabar Bishops' Synod and the Malankara Catholic Episcopal Synod. This chapter provides critical reflection upon the particular law of these Churches as well as draws points for future legislative improvement. It also critically examines the current functioning of these Churches and some of the modern pastoral challenges which they face. The fourth and final chapter examines the institution of the Assembly of Hierarchs of Several Churches *sui iuris* in general and the Catholic Bishops' Conference of India in particular (CBCI). As in the previous chapters, the statutes of the body are examined and analyzed.

The book conveniently provides numerous historical resources in a single volume. It also conveniently contains the complete statutes of all four

juridical bodies as appendices. While some of these statutes were previously printed in other works, they are not always easily obtained and it is helpful to have them in a single volume. The text also provides interesting critical analysis of the statutes present in the text.

At the same time, the text interestingly delves only superficially into the institution of the assembly of hierarchs of several Churches *sui iuris*. While the second chapter examines the history of the episcopal conference in great detail, the same attention is not given to the assembly of hierarchs which, like the episcopal conference, predated the Second Vatican Council. There is also, interestingly, no attention paid to the predominant works which focused specifically on the assembly of hierarchs which have been completed in recent years. A more critical examination of the inter-ritual activity from a juridical standpoint would have been welcome: Arakkal places the CBCI in the context of *CCEO* canon 322 but this may not be a reasonable conclusion based on its history, statutes, and the fact it is listed by the Holy See not among the canonically erected assemblies (currently exclusively in the Middle East), but among the Conferences of Bishops. This is but one example of the text being overly anecdotal and not sufficiently juridical. There is noticeably no mention of the abundant body of critical reflection on *Apostolos suos* which have been present in theology over the years since the promulgation of this *motu proprio*. Finally, the text is woefully edited, and a reader will need to look past typographical issues throughout the printed text.

The text does provide a useful single-volume introduction to the ecclesial context of India and its three Churches *sui iuris*. For that, the author should be commended. If someone was interested in gaining a better understanding of the distinctions between the three Churches present in India and their current canonical challenges, this is a worthwhile text to read.

Alexander M. LASCHUK

BAURA, Eduardo, Nicolás ÁLVAREZ DE LAS ASTURIAS, Thierry SOL (dir.), *La codificazione e il diritto nella Chiesa*, Milan, Giuffrè Editore, 2017, 301 p. — ISBN 978-88-14-22160-6 — € 32,00

Les commémorations se succèdent tout au long de l'année 2017 : centenaire des apparitions de la Sainte Vierge à Fatima, centenaire de la révolution russe, centenaire de la poursuite de la Grande Guerre, mais aussi centenaire de la promulgation de la première codification officielle de l'Église, le Code de droit canonique pie-bénédictin.

Le présent ouvrage s'inscrit dans ce dernier cadre. Il réunit les interventions d'un colloque organisé par la faculté de droit canonique de l'Université pontificale de la Sainte-Croix. L'objectif de cette réunion scientifique était de réfléchir sur le phénomène de codification dans l'Église sous son aspect juridique. C'est ce que le titre de ce volume entend exprimer : « étudier les effets de la codification sur le droit dans l'Église—sur les droits, au pluriel, des fidèles—, sur l'expérience juridique et sur la science du droit » (préface). Les intervenants ont donc cherché à comprendre de quelles idées juridiques la codification canonique est porteuse, l'état présent de la loi codifiée et ses conséquences pour la doctrine. L'étude est menée en deux temps, avec en premier lieu l'analyse de l'impact produit par l'expérience de la codification sur le droit canonique, et, ensuite, l'étude de la réalité du droit codifié tel qu'il se présente à nous.

La première partie porte donc sur « l'expérience de la codification dans l'Église ». Le professeur Carlo Fantappiè ouvre les travaux en décrivant le passage « du paradigme canonique classique au paradigme de la codification » (p. 3-34). Il souligne que la promulgation du code comporte le passage de la raison prudente de l'interprète à la raison consistant à appliquer la norme préalable abstraite. Pour comprendre l'état actuel du droit canonique, il faut réussir à identifier les structures épistémologiques et institutionnelles qui caractérisent le droit canonique à une époque déterminée, afin de discerner les changements et les réductions qui se sont produits avec le temps et éventuellement apporter des correctifs au système des sources en vigueur.

« L'esprit codificateur et la codification latine » (p. 35-69) est le sujet traité par le professeur Eduardo Baura, qui cherche à montrer comment la codification canonique a accueilli « l'esprit de la codification », c'est-à-dire à créer un système normatif capable de diriger l'ensemble de l'expérience juridique. L'auteur souligne que « la codification canonique a conduit à un accroissement de la production normative, a déplacé l'expérience juridique de l'activité jurisprudentielle à l'activité législative et a essayé, au moins au début, d'affaiblir la science juridique en prétendant la réduire à la seule exégèse » (p. 66). Ce qui a amené bonne partie des canonistes à abandonner la science de la *iuris-prudentia* pour passer à celle de la *iuris-logica*, avec pour conséquence paradoxale que la codification canonique a instauré de fait un système juridique plus dépendant du code que les autres ordres juridiques.

Le professeur Valentín Gómez-Iglesias C. étudie « la réception du code de 1917 dans la doctrine et dans l'enseignement » (p. 71-119). Cette réception par la doctrine est examinée pendant le processus d'élaboration du *Codex* puis dans les années suivant sa promulgation. Quant à l'enseignement, il est tributaire de la constitution apostolique *Deus scientiarum Dominus*, de

1931, qui impose la méthode exégétique. La doctrine canonique va alors prendre soit un caractère exégétique, soit, comme en Italie, un caractère systématique, avec la dogmatique juridique italienne. Il revint au professeur Pedro Lombardía de remettre en cause le rôle central et quasi unique de la loi positive dans le droit canonique, d'envisager des droits et des devoirs fondamentaux du chrétien acquis par le baptême et de privilégier la méthode systématique en se démarquant ainsi du courant exégétique, tout en recourant à la pureté méthodologique formelle face à la pureté méthodologique totale en échappant par-là à la dogmatique italienne.

Le professeur Orazio Condorelli aborde la question de « la réception de la tradition dans la codification latine. Le cas du pouvoir des évêques » (p. 128-168). L'auteur commence par étudier la présentation du pouvoir des évêques par D.-M. Bouix et F. X. Wernz, avant de montrer comment il est abordé par le code de 1917, qui passe sous silence la dimension constitutionnelle du collège épiscopal en tant que tel. Le contenu du pouvoir épiscopal continue de dépendre d'une ecclésiologie dominante qui configure la juridiction épiscopale comme étant, certes, établie par le Christ, mais concrètement conférée aux évêques par le pape. Le caractère ordinaire du pouvoir de juridiction des évêques ne provient pas seulement de son lien avec l'office épiscopal et de son attribution *a iure*, mais est tel en ce que la *potestas iurisdictionis* doit être exercée *ad normam sacrum canonum* et se décline en pouvoir législatif, judiciaire et coercitif, classification qui n'emporte pas l'adhésion de toute la doctrine. Cependant des changements notables étaient introduits par rapport à la tradition : le pouvoir ordinaire des évêques pouvait être élargi dans certains cas, les évêques jouissent d'une *potestas dispensandi* et disposent de facultés habituelles. L'auteur montre enfin le changement de perspective opérée par le magistère du concile Vatican II.

« Codification et canonisation des doctrines ; le cas du mariage » (p. 169-202) est le sujet développé par le professeur Thierry Sol. Il présente d'abord les choix méthodologiques, où l'on voit le rationalisme être l'objectif et la méthode de la codification. Puis, il étudie les propositions doctrinales relatives à la définition de l'institution matrimoniale, pour se demander quelle a été leur influence sur les canons 2012 et 2013 du Code de 1917, tant à propos de la distinction entre contrat et sacrement qu'à propos de la hiérarchie des fins du mariage. Des auteurs ont fait remarquer que le cardinal Gasparri avait introduit dans le code une conception thomiste du mariage en insistant sur la finalité procréatrice, et en reléguant au second plan la notion de communauté de vie, une conception contractuelle du *ius in corpus* s'imposant ainsi à la vision personnaliste du mariage. L'auteur conclut par une remarque : il est possible, sans sortir de la conception thomiste, de comprendre que

« l'analogie principal est l'*in facto esse*, tout en sachant qu'il diffère de la 'vie matrimoniale', c'est-à-dire de la réalisation effective du mariage dans l'existence des conjoints » (p. 201).

La deuxième partie des travaux se centre sur « la codification après Vatican II ». Le professeur Giovanni Doria présente les « techniques juridiques et la codification aujourd'hui » (p. 205-214) dans le domaine civil, afin de situer la réflexion sur le phénomène de la codification canonique dans un contexte plus large. L'auteur présente les caractères qui définissent les processus modernes de codification, qui se retrouvent substantiellement dans le processus de codification du droit canonique. Il relève combien le « droit vivant » peut s'écarter du « droit des codes », puis, évoquant brièvement la multiplicité des sources dans la deuxième moitié du XX^e siècle, il constate que le terme de « code » fait de plus en plus l'objet d'un usage impropre.

Le professeur Nicolás Álvaro de las Asturias présente « la doctrine ecclésiologique de Vatican II et la codification » (p. 215-247) et se pose la question du pourquoi de la permanence d'une technique codificatrice. Il cherche ensuite jusqu'à quel point il est loisible de dire que le Code de 1983 traduit bien la doctrine ecclésiologique du concile Vatican II. Il se propose enfin de voir ce qu'il convient de faire pour tirer le maximum de profit des avantages de la technique de codification pour le bien de l'Église et comment en réduire au maximum les inconvénients. Le code pourrait mieux servir le droit de l'Église si les règles propres au système codifié étaient mieux respectées et si son rôle dans l'enseignement de la science canonique était revu. L'auteur critique à cet égard le fait de vouloir donner un fondement trop théologique au droit canonique.

Mgr Juan Ignacio Arrieta présente « le code et la pratique juridique » (p. 249-277), examinant d'abord les notions de *praxis curiæ* et de *stylus curiæ*. Il précise ensuite la valeur reconnue par le code à la pratique juridique, pour faire ressortir combien la pratique est un élément qui configure des positions juridiques et aussi qu'elle appartient au langage commun de l'administration ecclésiastique, dont elle est un élément unificateur.

Quel est « le rôle de la science juridique canonique à l'époque de la codification » (p. 279-296) ? Le professeur Gaetano Lo Castro y répond en montrant l'imbrication entre droit et code, puis la place prise par les instances politiques et idéologiques dans les codifications modernes. Il souligne des conséquences négatives de la codification dans la science juridique canonique, avec l'autolégitimation de la loi, le positivisme acritique, l'excès de dogmatisme et une perte de la conscience morale. Il montre alors le caractère fonctionnel de normes par rapport aux fins et aux valeurs affirmées et poursuivies par l'ordre canonique. Il relève *in fine* que le principal effort

méthodologique de la science juridique canonique à l'avenir est de contribuer à faire en sorte que, avec l'interprétation et l'étude du droit existant, avec la collaboration de ceux qui sont habilités à l'amender et à le renouveler, le droit se rapproche le plus possible du dessein de Dieu envers l'homme.

Dominique LE TOURNEAU

BRUGGER, Christian, *The Indissolubility of Marriage and the Council of Trent*, Washington, D.C., Catholic University of America Press, 2017, 295 p. — ISBN 978-0-8132-2952-2 — US\$ 69.95

The Council of Trent (1545-1563) did not directly condemn the Greek practice of allowing a post-divorce marriage during the lifetime of a previous spouse. Recently, however, this failure of the Tridentine fathers to anathematize the Eastern practice directly—a decision taken to avoid disturbing the fragile union between East and West during those tumultuous times—has been parlayed by some into a tacit Western approval of divorce and remarriage. This Tridentine reticence to condemn Eastern practice here, it is now claimed, points the way toward welcoming divorced-and-remarried Catholics to full Eucharistic communion in the wake of, if not *Amoris laetitia* itself, a broad reading of the 'discernment' and 'accompaniment' language employed in *Amoris*. In short, the suggestion is that perhaps the East is on to something and, as it happens, the West has already quietly conceded the point.

But Dr. Christian Brugger, a moral theologian lately of the Culture of Life Foundation in Washington DC, will have none of it. His calm, careful, and concise examination of the Tridentine texts and of the interventions and reports generated by theologians and bishops leading up to those final texts is, in my view, the definitive reply to claims that the conciliar fathers, in any way, conceded the liceity, let alone the validity, of remarriage after divorce among Christians living in a consummated Christian marriage.

Brugger's primary interlocutor this volume is the Jesuit theologian Piet Fransen (1933-1983) who, though himself simply in a line of scholars who thought the Tridentine formulation left the door open to some kind of divorce and remarriage, was a major influence on several important twentieth century theologians (albeit less so, on canonists). Fransen's claim that Trent avoided condemnation of Greek divorce and remarriage in a way that left the door open to a later, wider ecclesiastical approbation of such practices is fairly presented by Brugger (15). At several points (e.g., 74, 108, 119, and 124), however, Brugger directly contests Fransen's discussion and, I suggest, turns the latter's thesis on its head, arguing, I think convincingly, that while Trent

indeed avoided direct condemnation of Greek divorce and remarriage, it did so in a way that leaves no doubt that the complete indissolubility of consummated Christian marriage is taught definitively by the Church. In Brugger's words, "The nagging suggestion ... that the Council of Trent does not teach definitively the doctrine of absolute indissolubility should finally be put to rest" (146).

That said, Brugger's book is much more than a debate with Fransen. It is a solid and self-sufficient analysis of a doctrinally and pastorally important episode in Church history. Warning that "unsubstantial assertions of what the Council did or did not do and say are common but inadequate as are the simple multiplication of authorities for one conclusion or the other" (19-20), Brugger proceeds to an analysis of the development and final form of Trent's famous Canon 7 (the express rejection of Western adultery-based divorce and remarriage and an indirect repudiation of the Greek divorce and remarriage "*ritus*"), paying, of course, due attention to Canon 5 (a direct rejection of some other Western proposals for divorce and remarriage) and to the doctrinal preamble that introduces these fundamental norms.

All history is in some sense a story and Brugger's presentation of the marriage debates at Trent allows for the some of that ecclesiastical drama to come through. For example, I found intriguing how the conciliar fathers and advisors dealt gently but firmly with what turned out to be a false text then-attributed to Ambrose in which the '*Mellifluous* Father' was thought to have endorsed marriage after divorce. The council's ecclesiastical equivalent of "Homer nodded" was charming. One is also struck by how much of the Tridentine debate seemed to assume (perhaps in response to Lutheran formulations of the issue) that the exceptive clause in Matthew XIX dealt with cases of adultery, a possible but by no means necessary translation of the koine word *porneia* (15). How, one wonders, might the conciliar debate have been facilitated by recognizing that Christ's limiting language could have referred to (to use modern terms) the nullity of a marriage based on an impediment and not to the dissolubility of the bond based on a choice.

Brugger invites readers with a background in the Tridentine law of marriage to skip his developmental discussions, especially chapters three and four, and move directly to his fifth and synthesizing chapter, and so I, armed with recollections of Joyce and Schillebeeckx, did exactly that. But, while that approach works, I strongly suggest reading Brugger in the excellent order that he lays out his research. His detailed exposition (featuring copious footnotes and Latin-English appendices that make up nearly half of this volume) of the conciliar drafts and debates over many years make it possible for the final formulation of Tridentine norms—which, at first glance, can

strike modern readers as not very systematic—truly to shine as texts rooted in history but pointing to the future.

My concerns with Brugger's text are few. Once or twice, as Brugger discussed papal "divorces", I wondered whether the "divorce" in question (treated as if from bed and board) was not actually a papal dissolution of a non-consummated marriage in view of, say, either or both spouses entering religious life, but Brugger understandably prescinds from exploring that unusual institution (16, 91). Also, more often than he already does (e.g., 1, 6, 127, 134), it might have helped readers for Brugger to remind readers that only *consummated* Christian marriage is indissoluble—although I can appreciate how tedious such repetitious qualifications would have become in a tightly written text such as this. At least once Brugger refers to the "doctors of the Church" when the context clearly implies "doctors of the law" (70). And perhaps Brugger might have underscored just how recent is the explicitation that indissolubility is distinguishable into intrinsic and extrinsic aspects (5, 131).

Also, occasionally, I was distracted when Brugger—a theologian and not a canonist—spoke of some provision or another as being 'merely normative' (even though such term still implies an obligation based on law and/or morals), when instead what I suspect he meant was that some observance was merely 'disciplinary' (which implies an obligation based only on law). And Brugger seems to under-appreciate how often the demands of disciplinary law might themselves rest on, or at least help illuminate, what are in fact doctrinal principles. But these are small points and none of them detract from the fine achievement that is Brugger's work.

Edward PETERS

ERRÁZURIZ M., Carlos J., *Corso fondamentale sul diritto nella Chiesa. II. I beni giuridici ecclesiali. La dichiarazione et la tutela dei diritti nella Chiesa. I rapporti tra la Chiesa e la società civile*, Milan, Giuffrè Editore, 2017, 734 p. — ISBN 978-88-14-22120-0 — € 74,00

Sainte Thérèse d'Avila témoignait : « Les paroles de l'Évangile me font entrer dans un plus grand recueillement que les ouvrages les plus savants et les mieux écrits, principalement lorsque les auteurs ne sont pas fort approuvés ; car alors il ne me prend jamais envie de les lire » (*Le Chemin de la perfection* 21). Ici nous avons à faire à un auteur éprouvé et, je dois confesser, que je ne lis jamais les écrits du professeur Errázuriz sans une certaine dilection. Le présent volume ne fait pas exception. D'autant que je me

retrouve dans un certain nombre des sujets évoqués, que ce soit les biens juridiques ecclésiiaux, notamment la dimension juridique du sacré, et dans toute la question des droits (et des obligations) dans l'Église.

Le premier volume de ce cours fondamental sur le droit dans l'Église comportait une introduction générale et présentait ensuite les sujets ecclésiiaux du droit. Il aura fallu attendre neuf ans pour disposer de ce deuxième tome. Rien qu'en elle-même cette donnée laisse entendre le travail que cela a supposé et à quel point il traduit vraiment de façon nette et précise la pensée de l'auteur.

Comme le premier volume, celui-ci se situe dans la perspective du droit en tant qu'objet de la justice, entendu que « le droit canonique ou ecclésial est ce qui est juste dans l'Église du Christ ». L'ecclésiologie du Peuple de Dieu, théologiquement inséparable des notions de communion et de sacramentalité au sens large, montre l'importance de la personne dans l'Église. Consolidant les dimensions communautaire et hiérarchique, elle permet aussi de compléter la prise en compte juridique du pouvoir des pasteurs sacrés par celle du domaine d'autonomie légitime des fidèles. L'harmonie fondamentale entre pouvoir et liberté s'exprime du point de vue juridique par la dimension de justice de chacune d'elles : le juste pouvoir et la juste liberté, bien loin de s'opposer, se renforcent au service de la mission ecclésiale orientée vers l'humanité tout entière. L'auteur estime que « cette approche réaliste, selon laquelle le droit est une dimension qui appartient intrinsèquement à l'être de l'Église sur cette terre, est en mesure d'attirer beaucoup plus à fond l'attention de celui qui l'étudie, et peut créer ainsi les conditions d'une meilleure insertion de la science canonique dans les deux mondes auxquelles elle est unie par nature : celui des disciples théologiques et celui des sciences juridiques » (préambule).

Ce manuel devrait aider à se pénétrer d'une mentalité juridique canonique, et à penser en véritable juriste dans la solution des problèmes qui se présentent à lui, afin d'interpréter correctement les normes canoniques dans l'optique d'une justice intraecclésiale. Il suit une méthode non pas exégétique, mais systématique, évitant par-là de prendre le code pour un texte scientifique et didactique. Le professeur Errázuriz avertit également qu'il convient absolument d'éviter de penser que le droit ecclésial s'identifie au code, principalement parce que « ce qui est au centre de l'attention du canoniste, c'est la réalité juste de l'Église, les rapports réels de justice intraecclésiaux, non le code ni les autres normes canoniques, aussi utiles et importantes soient-elles en tant qu'instrument de justice dans l'Église » (*Ibid.*).

Ce volume, suite du précédent, s'ouvre donc sur une troisième partie consacrée aux « biens juridiques ecclésiiaux ». Il s'agit d'abord de la Parole

de Dieu (p. 3-129), bien juridique en soi. Il faut étudier les rapports du fidèle avec cette Parole, puis le rapport de l'Église institutionnelle avec elle, et notamment la responsabilité de la hiérarchie, la formation chrétienne présentant une nature de vocation, et la Parole de Dieu dans les domaines de l'éducation et de la communication sociale. Pour nous limiter ici, faute d'espace, à la Parole de Dieu, relevons que les présupposés de sa nature juridique sont sa vérité objective, le fait qu'elle a été confiée à l'Église pour qu'elle la garde en préservant l'authenticité et l'intégrité, et sa destination universelle. Les rapports juridiques relatifs à la Parole de Dieu sont, en fonction des sujets, des rapports existant entre toute personne humaine et l'Église, entre le fidèle et l'Église, entre la hiérarchie et l'Église tout entière et tous les fidèles, entre les divers types de fidèles. Du point de vue des diverses fonctions incluses dans le *munus docendi* l'on a les rapports concernant la conservation et la diffusion du dépôt de la foi, l'approfondissement de la vérité révélée, la diffusion de la Parole et sa réception. Et quant aux biens juridiques protégés il s'agit de l'authenticité de la Parole de Dieu, de l'accomplissement effectif de la tâche d'évangélisation, du respect de la diversité fonctionnelle et de la liberté légitime accompagnée de l'autonomie des fidèles dans leur participation au *munus propheticum*. L'on notera encore que le bien de la Parole est inséparable du respect dû aux sacrements, du respect des mœurs et du respect de la vérité naturelle, qu'il a à voir avec l'œcuménisme et avec le dialogue interreligieux et enfin qu'il doit être adapté à la capacité et aux besoins des fidèles destinataires de ce bien.

La sainte liturgie, et les sacrements en particulier (p. 130-281) constituent un autre vaste secteur de biens juridiques. L'auteur insiste sur le fait que « la liturgie, sacrements comme son noyau y compris, constitue un bien juridique ecclésial, ce qui comporte l'existence de droits—de l'Église en tant qu'institution et en même temps des personnes—et de ce fait des rapports de justice inhérents à la réalité liturgique tout entière » (p. 132-133). Il s'ensuit qu'à la différence de la vision ritualiste et rubriciste de la liturgie, le droit n'en est pas une dimension extrinsèque, mais un aspect vraiment intrinsèque, qui fait nécessairement partie de la célébration du mystère chrétien sur terre, tout comme d'autres dimensions théologique, pastorale ou autres. Par conséquent, si l'on saisit bien que l'essence du droit est ce qui est juste, l'on comprend que le fait se valoriser la dimension juridique de la liturgie ne fait pas courir le risque de tomber dans le juridisme. Ces prémisses étant posées, l'auteur peut présenter les droits et les devoirs de l'Église institutionnelle et des personnes dans le domaine des biens de la liturgie, puis noter des caractéristiques du bien juridique de la liturgie sacrée : la célébration rituelle comme aspect de la liturgie à laquelle la dimension de droit liturgique est liée en tout

premier lieu ; le caractère central du bien de la liturgie dans le droit ecclésial ; l'unité de bien de la liturgie avec les autres biens salvifiques, en particulier celui de la Parole de Dieu ; la structure communautaire-hiérarchique du bien juridique de la liturgie sacrée ; l'authenticité et la destination aux personnes en tant qu'aspects du bien juridique de la liturgie. Viennent ensuite la dimension juridique de la configuration et de la réalisation de la liturgie, puis les sacrements en tant que droits de l'Église institution et des personnes, étant entendu qu'il n'est question ici que des sacrements en tant que droits, non des sacrements comme producteurs d'effets juridiques. L'auteur passe en revue les sacrements l'un après l'autre (hormis le mariage) et n'omet évidemment pas de mentionner d'autres actes juridiques qui se présentent également comme des droits de l'Église institution et des personnes : sacramentaux, liturgie des heures, liturgie des funérailles. Enfin les temps sacrés, les lieux sacrés et d'autres biens matériels connexes avec la liturgie ont eux aussi une dimension juridique.

Le chapitre suivant traite « du mariage et de la famille » (p. 283-435). Le sacrement de mariage est envisagé à part, car il présente cette caractéristique « d'être le sacrement d'une réalité qui existe déjà dans l'ordre de la création, d'être le pacte conjugal institué par le Créateur 'au commencement' » (Jean-Paul II, *Familiaris consortio* 68), relevant donc du droit naturel. Ceci dit, la dimension juridique du mariage ne peut se ramener à la problématique des procès en déclaration de nullité. Le vrai caractère juridique du mariage se trouve dans une vie vécue par les fidèles selon la justice en la matière, avant tout de la part des conjoints et entre parents et enfants. Il serait utile à cet effet d'élaborer un vrai droit canonique de la famille. Pour son étude de droit fondamental du mariage et de la famille dans l'Église, le professeur Errázuriz part de la foi et de la raison comme le réclame le lien particulier existant en ce domaine entre l'économie de la création et celle du salut, entre l'ordre naturel et l'ordre surnaturel. La vérité révélée éclaire l'entière réalité matrimoniale et familiale, y compris dans ses aspects naturels qui appartiennent au mystère de l'alliance entre Dieu et l'homme. Il s'ensuit que, dans leur profonde unité, la sainte Écriture, la sainte tradition et le magistère vivant de l'Église « offrent une connaissance unique du dessein d'amour mis par Dieu dans le mariage et dans la famille, dimension juridique ou de justice comprise » (p. 287). L'auteur présente donc, sans vouloir constituer un manuel sur le droit matrimonial, le mariage et la famille comme biens juridiques ecclésiaux, des notions fondamentales sur le mariage, le mariage *in fieri*, et la dimension juridique ecclésiale de la vie matrimoniale et familiale.

Le chapitre suivant porte sur « le service de la charité » (p. 437-462), mis en évidence par l'encyclique *Deus caritas est* et par le motu proprio *Intima*

Ecclesiae natura, de Benoît XVI. Ce service de la charité porte sur des biens naturels de l'homme qui rentrent d'une certaine façon dans la sphère des rapports intrapersonnels ecclésiaux de par leur destination aux pauvres. Il s'agit de biens du corps ou de l'esprit et s'exerce *dans* l'Église, car il n'est pas l'apanage de la seule Église institutionnelle.

Un dernier chapitre aborde le domaine des « biens temporels dans l'Église » (p. 463-507), des biens qui ont à voir avec le droit naturel de liberté religieuse et qui participent aussi de façon instrumentale à la nature salvifique et sacrée de l'Église. L'auteur étudie les grandes lignes de la discipline actuelle en la matière.

Nous en arrivons à la quatrième partie sur « la déclaration et la protection des droits dans l'Église », ce qui comprend d'abord « les procès dans l'Église » (p. 511-626) puis « les délits et les peines dans l'Église » (p. 627-679). Si l'auteur a tenu à rapprocher ces deux matières, c'est parce qu'elles « se situent toutes deux au service des droits-biens ecclésiaux des fidèles et des autres personnes humaines en tant qu'unies à l'Église, de l'Église comme institution et des réalités associatives ecclésiales » (p. 512). De sorte que pour comprendre ce qu'est un procès et ce que sont le délit et la peine « il est décisif de mettre en évidence leur rapport constitutif avec le droit compris comme ce qui est juste » (*Ibid.*). Après avoir mentionné quelques questions fondamentales sur le procès et sur son application dans l'Église, le professeur Errázuriz jette un regard d'ensemble sur la discipline actuelle en matière de procès puis décrit les principaux procès ecclésiaux existants, dont bien entendu le procès *brevior* établi par *Mitis Iudex Dominis Iesus*. Quant aux peines, il commence par les décrire avant d'aborder quelques questions fondamentales sur les délits et les peines dans l'Église, à savoir la finalité de la peine canonique, le concept de délit canonique et le concept de peine canonique. Il présente ensuite les aspects essentiels de la discipline en vigueur en matière de délits et de peines.

S'ouvre alors la dernière partie sur « les rapports entre l'Église et la société civile » (p. 683-722), avec un chapitre unique qui porte essentiellement sur l'évolution historique de ces rapports, avant d'aborder brièvement la dualité juridique entre l'Église et la société civile. C'est le *Ius Publicum Ecclesiasticum* qui traitait de ce sujet jusqu'au concile Vatican II. Cette discipline doit être remplacée par une discipline nouvelle, qui pourrait précisément s'appeler « rapports entre Église et société civile », et qui devrait aborder toutes les questions dans lesquelles existent des rapports entre l'Église et la société civile, par exemple reconnaissance civile des confessions, associations, éducation, mariage, biens culturels, etc., questions examinées selon des critères de justice. Comme ces critères s'appuient sur des droits naturels, « ils seraient redécouverts, dans une conception classique et chrétienne, en

tant que biens des personnes et des sociétés qui, comportant des exigences sociales de justice, sont accessibles à la raison pratique des hommes de bonne volonté » (p. 720).

Nous n'avons pu en quelques lignes que donner un pâle reflet de la richesse contenue dans cette œuvre magistrale du professeur Errázuriz appelée à faire date et à servir de référence ainsi qu'à former, espérons-le, des générations d'excellents canonistes.

Dominique LE TOURNEAU

HILL, Mark, and R. H. HELMHOLZ, (eds.), *Great Christian Jurists in English History*, Cambridge, Cambridge University Press, 2017, 353 + xxii p. — ISBN 978-1-107-19055-9 (hb) — \$ 125.00; ISBN 978-1-316-63801-9 (pb) — \$ 39.99

This volume is part of the Cambridge Studies in Law and Religion series, and is the first of the national volumes within the Great Christian Jurists sub-series. The papers here published were presented in early drafts at a symposium at Emmanuel College, Cambridge, and are the work of an international group of legal historians and jurists; the preface is provided by Lord Mackay of Clashfern, the former Lord Chancellor (1987-1997).

Fourteen essays are contained in this volume, and despite the limitation such a number would impose on such a study, the breadth is still significant: two were clerics (Henry of Bratton from the thirteenth century, who may, or may not, have been the author of *On the Laws and Customs of England*, and Richard Hooker [1554-1600], far better known as the author of *On the Lawes of Ecclesiastical Polity*, the classic theological presentation of the Elizabethan settlement of religion), two were civilians, or lawyers trained in the civil law tradition deriving from Roman Law (William Lyndwood [d. 1446] and Stephen Lushington [1782-1873], Dean of the Arches and one of the last English civil lawyers), and the remaining ten were common lawyers. Bratton (*alias* Bracton) is the earliest, while the most recent, Lord Denning (1899-1999, Law Lord and later Master of the Rolls for twenty years), died only twenty years ago. Sir Edward Coke and William Blackstone are vital to any legal historian's library, although their theological views have received less attention.

While all of the names presented are "great" and deserve inclusion, several may be less well known by canonists or those beyond the seas. Christopher St Germain, for example, is probably better known outside of England as the opponent of Sir Thomas More in a long running "battle of

the books,” giving rise to Ian Williams’ comment that “St Germain is one of the few authors whose works can accurately be described as having tried the patience of a saint” (76). While Frederic Maitland is known and carefully studied wherever the history of English law is, and while he certainly qualifies as “great,” it is somewhat startling that he is included in a group of “Christian” jurists, particularly given his famous statement in *Roman Canon Law in the Church of England* that he was “a dissenter from both [the English and the Roman Church], and from other churches.” This makes it all the more remarkable, as Russell Sandberg’s essay brings out, that Maitland argued the “papalist” position in the renowned Stubbs-Maitland controversy concerning the status of canon law in England prior to the Reformation, against the distinguished historian—and Bishop of Oxford—William Stubbs. While a dissenter from Anglicanism and Roman Catholicism, Maitland was certainly no advocate for atheism.

The main theme traced in these essays is the way in which the Christian faith of the lawyers presented here informed their lives and work. Each essay has an introductory, and necessarily cursory, biography providing context for the more evaluative consideration of the subject’s writings and opinions. There is a certain un-evenness, however, in the presentations, because of the nature of the study more than because of the work of the essayists. This comes from the nature of the intersection between law and religion that this book highlights. The very first, very sweeping, sentence in the introduction (“Modern law treats adherence to the Christian religion as a matter of private choice”) raises significant questions about ecclesiastical law, an area referred to, and perhaps dismissed, by Andrew Phang in his essay on Lord Denning as “recondite.” Whether used in its narrower (“technical,” as Phang calls it) meaning of the laws by which the church is regulated by the state, or in its broader sense as “the law relating to any matter concerning the Church of England” (337), ecclesiastical law is noticeably absent in many of these essays. The same could be said of canon law, in the sense of the law by which the church regulates itself.

After reading these essays, two questions remained for this reviewer. First, are there any canonists, properly so called, who could be included within a collection of “great Christian jurists in English history”? The parade of jurists starts a century too late to include any of the canonists of the Anglo-Norman school, and that is unfortunate. Though the Anglo-Norman school did not have any major university as its centre, the number of English canonical manuscripts from the twelfth century which survive is astonishing. The earliest treatise, the *Summa De multiplici iuris divisione*, dates from just prior to 1170 (and its consideration of clerical immunity clearly shows composition prior to the murder of Thomas Becket), and is

contained in five extant manuscripts: this suggests a huge circulation in its own period, given the probable loss of 90% of all copies and the fact that it was still being copied a century after its composition. Second, given the practical concern of much canonical scholarship, the peculiar English setting at the intersection of the developing canon and common law traditions could not help but add a new dimension to both common law and canonistic scholarship. Surprisingly, the history of the Anglo-Norman school of canonists, which flourished in the late twelfth and early thirteenth centuries, remains largely unexplored. Richard Helmholz, in his consideration of William Lyndwood (“medieval England’s leading canonist” [45]), refers to canonistic scholarship as a “‘no go’ zone in modern scholarship,” and offers some perceptive comments on why this is so.

The second question, outside of the scope of this book but still troubling, is whether “great Christian jurists” are still possible in England. On the day I finished this review, I picked up a legal notice in *The (London) Times* about the case of an ex-magistrate, Richard Page, who was granted permission, in a hearing on 27 November 2018, to take his case against the Lord Chancellor and Lord Chief Justice to the Employment Appeal Tribunal. Mr Page, 72, was removed as a magistrate by the Lord Chancellor and the Lord Chief Justice for expressing his view that it was in a child’s best interests to be raised by a mother and a father. The expression, in a BBC interview, led to an investigation and to his removal for “serious misconduct” because his Christian views had “brought the judiciary into disrepute.” Judge Katherine Tucker allowed Mr Page’s appeal to proceed, saying that judges have a fundamental role in democratic society; she said that “judges are permitted to hold even ‘intolerant’ views that should be respected.” It was unclear whether “intolerant” was being used as a synonym for “Christian,” and whether the scare quotes were in the original.

W. Becket SOULE, O.P.

NKOUAYA MBANDJI, Valère, *La prescription en droit canonique et dans la tradition du Code de Napoléon avec applications particulières aux délits les plus graves touchant aux mœurs*, Paris, Lethielleux, 2018, 360 p. — ISBN 978-2-249-62644-9 — € 20,00

The A., a Jesuit priest and *iuris utriusque doctor*, is assistant professor of canon law at Saint Paul University in Ottawa. This publication is his excellent doctoral dissertation on the canonical institute of prescription and its application to the sexual abuse of minors.

The work is logically divided into two parts of two chapters each. The first part provides the historical background and context necessary to frame the analysis undertaken in the second. Chapter One is devoted to a descriptive overview of prescription in the civil law tradition. The A. describes the origins of this institute in Roman law, the present disposition of law in three civil code jurisdictions (France, Belgium, and the province of Quebec), fundamental concepts and theories, and the controversy over its juridic nature (procedural/formal or substantive/material). The chapter ends by comparing and contrasting the civil institute with the related but distinct common law institute of statutes of limitation, based upon the excellent study of Brown (in *CLSAP*, 70 [2008], 383-451).

Chapter Two is devoted to a similar descriptive overview of prescription in the canonical tradition. The A. gives a brief account of this institute in the *Corpus iuris canonici* before delving into more comprehensive treatments of the *CIC*/1917 and *CIC*/1983 (citations to the relevant parallel passages in the *CCEO* being provided in the footnotes). Both contentious and criminal actions are treated in detail, including the sometimes overlooked proper distinction between criminal actions and penal actions. The A.'s degree in civil law is put to good use in the section on the canonisation of civil laws regarding prescription. The proper distinction between the interruption and suspension of prescription is clearly made, as is that between continuous and useful time. The A. argues convincingly that in the *CIC*/1983—unlike in the *CIC*/1917—prescription in criminal matters runs *continuously* and is only interrupted by a condemnatory sentence issued in first instance. Since these distinctions are poorly understood by many canonists today, the A.'s treatment is all the more valuable, particularly for francophones.

Chapter Three narrows the focus of the study to the prescription of criminal actions arising from the sexual abuse of minors. The point of departure for this focus is the disposition of the *CIC*/1983 (c. 1362), although sufficient attention is paid to the *CIC*/1917 and the famous instruction *Crimen sollicitationis* (1922, 1962). The A. demonstrates his mastery of the numerous subsequent derogations, leading the reader through the labyrinth of the exceptions introduced for the United States (1994), the short-lived period of clarity introduced by *Sacramentorum sanctitatis tutela* (2001), the subsequent modifications of *SST* (2010), and the rescript authorizing the CDF “to derogate from the terms of prescription on a case-by-case basis” (2002). To the best of this reviewer's knowledge, the A. was the first to publish an analysis of the juridic nature of the favor granted by the 2002 rescript. Relying upon the fundamental studies of Huels (*Jur*, 63 [2003], 313-252) and McCormack (*The Term Privilege*, U. Gregoriana, 1997), the A. adroitly argues that, although the favor has been

called by a number of different names—faculty, indult, derogation, dispensation—it is best classified as a *privilege*.

The fourth and final chapter raises the question of the suitability of prescription in cases of sexual abuse of minors. The A. first explores whether or not such abuse constitutes the imprescriptible “crime against humanity” as defined in the Rome Statute (17 July 1998) of the International Criminal Court, but he finds in the negative. Secondly, the A. considers the arguments in favor of prescription—namely, the protection of the natural law right of defense and the importance to the common good of juridic certainty and stability. The A. is not convinced by these arguments, however, and strongly argues on the basis of an appeal to canonical equity for a return to the former discipline of imprescriptibility. Although this reviewer is not persuaded by the A.’s argument here, he certainly agrees with him that a return to “a system of imprescriptibility valid for all would be preferable to [the current system of] twenty years ‘derogable’ for some, which risks an arbitrary use of judicial power” (275).

This study is an excellent, scientific, extremely well-written contribution to the literature on canonical prescription. Canonists will surely look forward to future publications by this new scholar.

Brian AUSTIN, FSSP

NSOMWE, Constantin Y., *Le contrôle de l'activité administrative en droit canonique*, Paris, Éditions Lethielleux, 2016, 283 p. — ISBN 978-2-249-62400-1 — € 22,00.

C’est fort à propos que l’auteur de ce livre fait remarquer qu’à l’instar de toute société de droit, l’Église catholique romaine dispose d’une Administration qui exerce une activité administrative susceptible d’être soumise à un contrôle juridictionnel. Le professeur Constantin Y. Nsomwe a le grand mérite de décrire de manière systématique les actes administratifs canoniques ainsi que la procédure légale de résolution des conflits que lesdits actes peuvent générer.

L’ouvrage est divisé en deux parties. La première partie est consacrée à l’activité administrative canonique. Cette dernière appartient au pouvoir exécutif et se déploie à travers les actes du pouvoir administratif (cc. 1400, §2 et 1445, §2) qui modifient la situation juridique des particuliers. Deux chapitres subdivisent cette partie. Le premier chapitre énumère et définit les types d’actes généraux: les décrets généraux qui sont de nature législative et sont édictés par le législateur (c. 29) ou par l’autorité exécutive par délégation de l’autorité législative (c. 30) ; les décrets généraux exécutoires qui

sont édictés par ceux qui détiennent le pouvoir exécutif (cc. 31-33) ; et les instructions qui sont des dispositions exécutoires qui visent l'exécution des lois et des coutumes (c. 34). Les décrets généraux exécutoires et les instructions sont soumis au principe de légalité (p. 43). Ils doivent avoir une base légale et respecter la loi à laquelle ils sont subordonnés. Le deuxième chapitre traite des actes administratifs particuliers (cc. 35-93). L'auteur étudie d'abord les sept éléments faisant partie des normes communes aux actes administratifs particuliers : la notion d'acte administratif particulier, sa forme, son efficacité, la clause dérogatoire et le pouvoir de l'autorité, l'exécution d'un acte administratif particulier, son interprétation et son extinction. Il présente ensuite la typologie des actes administratifs particuliers dans le Code de 1983 (p. 65) : les décrets et les préceptes particuliers (cc. 48-58), les rescrits (c. 59), les privilèges (c. 76, §1), les dispenses (c. 85). Traitant de la formation des décrets particuliers spécifiques, l'auteur présente la procédure de révocation et de transfert des curés (p. 69), la procédure de renvoi d'un religieux (p. 86), la procédure d'infliction ou de déclaration des peines par voie administrative (p. 97).

La deuxième partie de cet ouvrage présente le contentieux administratif canonique. En effet, en disposant que les litiges administratifs ne peuvent être déferés qu'au Supérieur ou au tribunal administratif qui constituent les juridictions administratives, le c. 1400, §2 affirme l'existence du contentieux administratif dans la société ecclésiale. L'auteur consacre trois chapitres à l'étude du contentieux administratif canonique. Le premier chapitre revient sur la notion même de contentieux administratif qui suppose la contestation de l'acte d'autorité. Une triple finalité est poursuivie par le contentieux administratif : veiller au respect du droit, veiller à la protection des administrés et mettre fin aux litiges entre les administrés et l'Administration (p. 146). Lorsque le c. 1400 soustrait de la juridiction judiciaire les litiges nés d'un acte de pouvoir administratif pour les confier à la juridiction administrative, il s'oppose au système de juridiction unique qui veut que tout litige administratif ou ordinaire soit déferé à la juridiction judiciaire et consacre la dualité de juridictions de l'administrateur-juge ou du supérieur-juge (155). Dans le deuxième chapitre de cette partie, l'auteur présente les organes de la juridiction administrative canonique : le Supérieur (c. 1400, §2), la Signature apostolique et le tribunal administratif du c. 1400, §2. Le troisième et dernier chapitre de ce livre est dédié à la procédure de résolution des litiges administratifs mis en place par le code actuel qui combine le système de supérieur-juge et celui du tribunal administratif. L'auteur expose les différents moyens d'éviter les procès canoniques tels la transaction, l'arbitrage, la réconciliation ou la conciliation, la médiation (p. 200). Il analyse les voies

de droit contre les actes administratifs particuliers tels : la supplique (cc. 1734-1736), le recours hiérarchique (cc. 1337-1739), le recours contentieux-administratif qui désigne la voie de droit devant le Tribunal Suprême de la Signature Apostolique en tant que juridiction administrative (p. 229).

Ce livre, écrit avec clarté et précision, est non seulement un matériel didactique très utile aussi bien pour ceux qui enseignent que ceux qui s'adonnent à l'étude du droit canonique, mais aussi il est une aide nécessaire aux ordinaires et aux supérieurs, qui titulaires d'un pouvoir exécutif, émettent des actes administratifs particuliers (cc. 35-93).

Valère NKOUAYA MBANDJI, S.J.

PADOA-SCHIOPPA, Antonio, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century*, Cambridge, Cambridge University Press, 2017, 808 + xiii p. — ISBN 978-1-107-18069-7 (hb) — \$ 150.00; 978-1-316-63230-7 (pb) — \$ 52.99

Antonio Padoa-Schioppa is Professor Emeritus and former Dean of the Law School at the University of Milan, where he taught legal history for several decades. This lengthy and significant book on the History of Law in Europe is clearly the result of a lifetime's experience both as a researcher and as a lecturer. The first Italian edition of this work was published in 2007 by Il Mulino. A revised Italian edition was released by the same publisher in 2016 and includes several additional pages about the Middle Ages, a new section on the developments of the European Union and updates to the bibliography; this revised edition is now translated into English by Caterina Fitzgerald, and must be awarded the highest praise that can be given to a translation—one does not realise, while reading it, that this work was originally written in another language.

European legal history is divided into five broad eras: Late Antiquity to the Early Middle Ages (Fifth-Eleventh Centuries), the Age of the Classical *Ius Commune* (Twelfth-Fifteenth Centuries), the Early Modern Period (Sixteenth-Eighteenth Centuries), the Age of Reforms (1750-1814), the Age of Nations (1815-1914), and the Twentieth Century. The work concludes with a forty-page (!) bibliography and a comprehensive index.

It is probably not necessary to point out the two significant challenges involved in producing a work of this scope: the first is how to recognise, and give appropriate weight to, the diversity of legal systems, political processes, and institutional contexts that stretch over a millennium and a half and over the whole European continent. The A. notes ("apologises" is probably too

strong a word) that far greater emphasis could be given to English law than he in fact does, but he highlights the interchange between English law and continental law (and here canon law and the *ius commune* would be classified as “continental”), even to the point of identifying areas in which canon law has influenced (modern) English law. It would be interesting to review the current Brexit debates in Britain against this background, to see how pervasive or even significant this influence is in the long run. The A.’s own views are never in doubt, or very much in the background, particularly when he derisively refers to “the creed of national sovereignty.” But for those readers whose background is primarily in the Anglo-American legal tradition, the detail and descriptions of the European systems and developments are needed and welcome.

The second challenge is a historiographic problem. Through what lens is the massive documentary history to be filtered? Through the present, so that much of the work becomes a description of “how we got to where we are now”? Or through a somewhat arbitrarily chosen “golden age”? The A. avoids both pitfalls by emphasising innovations (“continuities” and “discontinuities”) in each period, so that the bigger picture is not obscured, but a legalistic determinism is abandoned in favour of a continuous process of legal evolution.

For readers of this journal, a significant question is where canon law fits in the scheme of things, and it is here that the book does the great service of showing canon law as an integral part of legal culture and history, not simply in the period of the *ius commune*, but throughout the periods under discussion. Canonists themselves have sometimes been to blame for the absence of this discipline in larger studies, since so many lectures and books on the history of canon law end with the promulgation of the 1917 Code, as if the history of canon law stopped a century ago, and there is nothing more to be said -- if canonists ignore the development of the canon law in the past several centuries, there should be no surprise that other legal scholars do so as well.

While the A. certainly includes canon law up to the present day, he does tend to paint in fairly broad strokes: in describing the “innovations” present in the 1983 Code of Canon Law, he notes that “the 1983 code derives Church regulations first of all from precepts from Scripture beginning with the New Testament, an invariable tradition in canon law.” Many, if not most, canonists would be hard put to find the precepts of the New Testament expressed in the 1983 Code. It is interesting, however, to see how an “outsider” evaluates the current law within the context of historical development and a larger European context. Two other points in his consideration of the “innovation” of the current law of the Catholic Church stand out: the A. cites can. 5, and the presence

of customs *contra legem*, as a significant sign of legal flexibility in the current law (these “significant statements regarding customs that are ‘*contra legem*,’ that is, contravening canon law ... are not unconditionally rejected and may be admitted or tolerated”), although almost identical provisions were present in the 1917 Code of Canon Law, and, indeed, in Gratian. He also views as particularly significant John Paul II’s “acknowledgement of omissions and errors” on the part of the Church (referencing the 2000 “Day of Forgiveness”); it is not at all clear, however, how much difference that action has made in the Church’s *ius vigens*. The centrality of Vatican II for the new Code is highlighted in his discussion, and that, certainly, is beyond dispute.

The historical background is woven into each section, and it is most welcome, since few readers would be aware of the manifold and different historical events since the Middle Ages moulding the law from Sweden to Sicily. The A. does avoid having the book merely turn into a laundry-list of citations, and it is more than simply a reference work. It is an enjoyable tour of a landscape at once familiar and strange, with enough detail to give points of reference and enough vision to provide vistas.

W. Becket SOULE, OP

PAPALE, Claudio (ed.), *La procedura nei delitti riservati alla Congregazione per la Dottrina della Fede*, Quaderni di Ius Missionale, no. 12, Vatican City, Urbaniana University Press, 2018, 129 p. — ISBN 978-88-401-6098-6 — € 12,00

This most recent volume in the series Quaderni di Ius Missionale contains five papers delivered at the fifth intensive course organized by the faculty of canon law of the Pontifical University Urbaniana on 27 and 28 March 2017. Whereas the four previous intensive courses and subsequently published volumes focussed on matters of substantive law concerning delicts reserved to the Congregation for the Doctrine of the Faith (CDF), this fifth volume focusses on matters of procedural law. The five contributions, the first four in Italian and the fifth in English, are logically presented in a strictly chronological order, beginning with the preliminary investigation and ending with the possibilities for appeal and recourse.

The first contribution is that of the editor, Claudio PAPALE, professor of canon law at the Urbaniana and an advisor to the CDF, and concerns the preliminary investigation. Papale prefaces his talk with the observation—which, although commonly accepted, bears repeating—that the preliminary investigation is a *procedure* which takes place *before* the penal *process*

begins. That is to say, despite the somewhat infelicitous placement of canons 1717-1719 within a section of the 1983 code entitled “The Penal Process” (*De processu poenali*), the preliminary investigation is in reality the first phase of what Title XXVIII of the 1990 code more accurately terms “The Procedure for Imposing Penalties” (*De procedura in poenis irrogandis*). Before the preliminary investigation can begin, the competent authority must have received information regarding the commission of a delict which has at least the *appearance* of truth. The sole purpose of the preliminary investigation is to *verify* the *apparent* truthfulness of the specific information received: identification of the accused and victim(s), constitutive elements of the delict(s), relevant time(s) and place(s). This investigation is not a “fishing expedition” to search indiscriminately for any and all information regarding any and all possible delicts, nor is it the beginning of the penal process. The A. notes that the substantial norms of SST are not retroactive. While acknowledging that anonymous denunciations had no force in the canonical tradition, the A. nevertheless argues that such ought to be received today. He reviews the qualifications of the investigator. Concerning the question of whether or not the “elements collected” during the preliminary investigation are identical to “proofs” in the strict sense required by the penal process, he cogently argues that they are not. All the acts in such cases, including those of the preliminary investigation, are to be preserved in the secret archive and are also subject to the pontifical secret. The A. notes that most secular legislation fixes statutory limits for the length of the preliminary investigation (e.g., six months in Italy), but he argues (unconvincingly, in this reviewer’s opinion) against the suitability of such limitations in canon law. Finally, he reviews the manner in which the acts are to be forwarded to the CDF and the five possible outcomes, giving special attention to the non-definitive character of the decision to archive a particular case. His contribution is well supported by citations to recent and historical articles, relevant discussions of the Code Commission, and parallel legislation of the Eastern code.

The second contribution is by Davide CITO, professor of canon law at Santa Croce and a consultor of the Congregation for the Clergy, and concerns the difficult subject of the prescription of criminal action. In such a short space, the A. acknowledges that he is only able to raise—not resolve—some fundamental questions regarding this juridic institute. He begins with a fine overview of the recent history of the law and doctrine concerning this institute, beginning with the famous 1898 decision *Lublinensis* (the citation for which should be corrected to read ASS, 30 [1898], 677-689). He proceeds with the commentaries of Wernz, Lega, and Roberti and the subsequent process of revision, arriving finally at the dispositions of the 1983 and 1990 codes. Secondly, he celebrates

the juridic certainty regarding the prescription of actions reserved to the CDF occasioned by *SST*/2001, but he observes that it was almost immediately undermined by the so-called “faculty to derogate from prescription” of 7 November 2002. Finally, the A. raises four fundamental questions regarding prescription. In the first place, he observes that the law is silent regarding the specific acts which interrupt (or, in his view, also suspend) the running of prescription; following Llobell (in *IE*, 25 [2013] 641-661), the A. concludes (correctly, in this reviewer’s opinion) from this silence that prescription is only interrupted by a condemnatory sentence issued in first instance. Secondly, the A. briefly reviews the arguments in favor of the imprescriptibility of declaring penalties incurred *latae sententiae* for notorious delicts, siding with Roberti regarding the prescription of such declarations in non-notorious cases. Thirdly, he argues that, since the substantive legislation has changed several times in this regard, and since *SST* is not retroactive, the law more favorable to the accused must be applied. Fourthly, he argues that since the 2002 faculty of the CDF “risks appearing arbitrary,” it should be replaced with laws which would regulate the interruption and suspension of prescription. His contribution is a solid, if short, presentation of the *status quaestionis*.

The third contribution is by Andrea D’AURIA, also a professor of canon law at the Urbaniana and a consultant for the Congregation for the Evangelization of Peoples, and offers a fairly sustained critique of the administrative penal process. He begins with a synthetic overview of the process, indicating the clear preference of the preparatory commission, the code, and doctrine for the judicial rather than the administrative process. He situates the nearly universal practical preference for the administrative process in the weak formulation of c. 1342 (“*quoties iustae obstant causae*”) and in the desire of ordinaries and hierarchs for maximum expediency and flexibility. He notes *en passant* the following: the prohibition of using the administrative process to impose perpetual expiatory penalties in ordinary circumstances, the obligation of the superior to hear two judges or experts in the law, and the right of the accused to make administrative recourse. In extraordinary circumstances, when a judicial penal process would either be impossible or present grave difficulties, the competent Roman dicasteries have, of course, “special faculties” (which are better classified as privileges or special laws) to authorize the use of the administrative process in all cases. Rather than suggesting a return to the mandatory judicial penal process (which the A. thinks would be “anachronistic”), he offers the following suggestions on how the current administrative process might be improved: those who conduct the preliminary investigation and those who decide upon the merits of the case should be distinct persons; the bishop should refrain in such cases from personally

exercising his judicial power; the bishop should appoint administrative auditors and judges on a stable basis; the accused should have a right to an advocate; the intervention of the promoter of justice should be required; an extra-judicial penal decree should be fully motivated. The A.'s contribution is somewhat prolix but interesting and useful nonetheless.

The fourth contribution is the second by the editor, Claudio PAPALE, and highlights five particular aspects of *SST* which fall outside the scope of the other contributions. In the first place, the A. points out that the right of the CDF to judge cardinals, patriarchs, bishops, and others is not absolute but rather necessarily requires the previous mandate of the Roman pontiff for the validity of the process. Secondly, he observes that ordinaries and hierarchs have the right to judge delicts against the faith in first instance; the CDF, however, retains exclusive competence to judge certain persons in first instance and over all persons in second and further instances. Thirdly, the A. describes the phenomenon of "procedural attraction," whereby "other delicts" normally outside of the competence of the CDF may be prosecuted by that supreme tribunal in connection with another case over which it already enjoys competence. Fourthly, he observes that the faculty of the CDF to sanate violations of "merely procedural laws" is identical to the oral faculty granted by John Paul II on 7 February 2003, except for the insertion of the adverb "merely." Finally, the A. parses the difficulty of ascertaining the credibility of a penitent who has denounced a confessor but who wishes to remain anonymous; in such a case, the A. recommends resuming the former discipline which required verification of the good name of the penitent by two character witnesses.

The final contribution is by John Paul KIMES, a member of the CDF, and concerns impugning decisions of the CDF. In the first place, the A. clarifies that it is the exclusive right of the promoter of justice at the CDF to impugn a definitive sentence issued in first instance. Secondly, he indicates that the CDF has recently changed their practice and now follows the norms of CIC/1983 (cc. 1732-1739) when dealing with recourses made against singular administrative acts, further recourse to the *Signatura* remaining excluded. Thirdly, he describes the salient features of the *regolamento* (unofficially published in *Per*, 105 [2016], 366-367) of the special college internal to the CDF which adjudicates recourse. Finally, he notes that the "non-judicial phenomenon" of "seeking the personal involvement of the Holy Father ... has come into vogue in recent years (126)." Given the sustained and trenchant criticism of the administrative penal process by canonists such as Cardinal Grochowski and Archbishop Daneels, this reviewer cannot agree with Kimes' statement that "It is difficult to imagine a system which could offer greater guarantees for the rights of the accused" (120).

This slender volume offers many valuable insights into the current procedure and practice of the CDF in cases of reserved delicts. It is essential reading for practitioner and scholar alike.

Brian AUSTIN, FSSP

SOL, Thierry, *Droit subjectif ou droit objectif ? La notion de ius en droit sacramentaire au XII^e siècle*, Turnhout, Brepols, Medieval and Early Modern Political Theology, vol. 2, 2017, 331 p. — ISBN 978-2-503-57602-2 — € 80,00

Michel Villey situait le passage d'une conception réaliste à une conception subjective du droit (le droit conçu comme pouvoir de l'individu) au XIV^e siècle, lors de la controverse franciscaine et du développement de la philosophie volontariste d'Ockham. Brian Terney remet en cause cette hypothèse dans son ouvrage *Religion et droit dans le développement de la pensée constitutionnelle, 1150-1650*, publié à Paris en 1993. Il recherche les prodromes de la notion de droits naturels (*rights*, par opposition au droit objectif et positif, *laws*) dès le XII^e siècle. Michel Villey signalait lui aussi l'importance du XII^e siècle, mais y voyait au contraire la renaissance de la notion réaliste de droit, à la faveur de la redécouverte du droit romain et du développement de la jurisprudence. Pour Tierny, au contraire, elle signifiait l'installation du droit subjectif.

Pour trancher cette controverse, si importante pour qui entend sortir du subjectivisme ambiant et défendre une vision réaliste du droit, entre ces deux grands historiens et philosophes du droit, il convenait de retourner aux textes.

C'est le travail réalisé par Thierry Sol, docteur en sciences politiques et en droit canonique et professeur d'histoire du droit canonique à l'Université pontificale de la Sainte-Croix. Comme il le précise, il ne cherche pas a priori des « droits individuels », mais une façon subjective de penser le droit, à partir des facultés et pouvoirs dont un homme peut disposer. De ce point de vue, et sans nier l'intérêt d'autres domaines, l'auteur estime que « le *munus sanctificandi* se présente comme un terrain possible d'investigation et, du point de vue canonique, comme un terrain privilégié, puisque les sacrements sont au cœur de la mission de l'Église ».

Il s'ensuit que la recherche effectuée par le professeur Sol se centre sur la question suivante : le *ius celebrandi* (et de façon annexe le *ius ligandi et solvendi*) est-il l'objet d'une vision subjective du droit ? Ce thème est traité par Gratien et par les décrétistes. Il présente l'avantage d'aborder des situations limites, permettant ainsi de se demander dans quelles conditions une

faculté pourrait ne plus être appliquée. « Les problèmes de simonie, d'hérésie ou de schisme avaient en effet rendu la question pressante : un clerc simoniaque, schismatique ou hérétique peut-il encore célébrer les sacrements ? Ceux-ci seront-ils valides, licites ? Quels seront les critères juridiques qui permettent d'en décider ? »

À vrai dire, les deux raisonnements évoqués ci-dessus peuvent apporter une réponse à ces interrogations. Le *ius celebrandi* peut être traité sur le modèle du droit subjectif, comme l'exercice d'une *potestas* que le clerc a reçue au moment de son ordination. La faculté appartiendrait alors à la personne du ministre, plus que n'importe quel *dominium* ne pourrait l'être. Mais la *potestas ordinis* débouche-t-elle sur un *ius celebrandi* ? se demande le professeur Sol. Dit autrement, ce *ius celebrandi sacramenta* ne dépend-il que de la *potestas* du ministre ?

L'on peut aussi chercher à répondre à ces questions en suivant une conception réaliste ou objective du droit, qui consiste à se demander si la célébration du sacrement (l'objet) sera une chose juste en cas de simonie, de schisme ou d'hérésie, et qui déduit le caractère juste ou injuste de cette célébration non de la seule possession de la *potestas ordinis*, mais plutôt de l'opportunité de l'exercice de cette *potestas* par le ministre.

Toute la recherche menée à bien par l'auteur s'articule autour de la distinction entre *potestas* et *executio potestatis*. Il fera remarquer qu'un raisonnement qui partirait d'une conception uniquement subjective du droit ne disposerait que d'une très faible marge de manœuvre analytique, car il ne pourrait sortir des limites étroites de la question de la possession de la *potestas ordinis*. Refuser à un clerc de célébrer un sacrement revient, dans le cadre d'une conception subjective du droit, à remettre en cause son pouvoir sacerdotal : s'il n'a pas le droit de célébrer les sacrements, ce ne peut être que parce qu'il n'en possède pas le pouvoir. Et s'il ne possède pas le pouvoir, c'est qu'il ne l'a jamais reçu !

Les auteurs qui défendent la conception subjective du droit ne cherchent pas la réponse seulement du côté de la quantité de pouvoir reçue, mais aussi et surtout du côté de son exercice. « Ceux qui n'ont pas la perfection de l'Esprit » sont ceux qui ont été validement ordonnés et ont reçu la *potestas ordinis*, mais à la différence de ceux qui ont reçu le sacrement dans sa perfection, ils ne peuvent pas l'exercer. Ne pas avoir reçu la perfection de l'Esprit ne se traduit donc pas, du point de vue juridique, par un amoindrissement du droit des clercs provenant d'une *potestas* diminuée, mais comme l'exercice réduit ou interdit d'une *potestas* entière, parce que les circonstances en rendent l'application injuste.

Or, avec Huguccio, l'on passe de la distinction simple entre *potestas* et *executio potestatis* à une distinction plus articulée entre *potestas*, *executio*

quoad ius, executio quoad actum exteriorem. Les sacrements sont distingués du pouvoir de lier et de délier, en raison de la finalité de l'action et de sa signification. Les effets des sacrements sont différenciés : l'*ordinatio* peut être *irrita quoad sacramenti veritatem, quantum ad officii executionem, quantum ad beneficii perceptionem*. Le sacrement, le ministre, le fidèle sont autant de points de départ pour l'analyse des facteurs qui concourent à établir la justice de la célébration d'un sacrement ou à la justice d'une sentence. Le caractère juste du sacrement exige une analyse ne se limitant pas au seul ministre. De sorte que l'analyse subjective du ministre, de ses qualités, de ses potentialités ne constitue pas la source du droit. Il s'agit certes de conditions de son exercice, insuffisantes cependant pour déterminer son existence dès lors que la justice vient à manquer. Or, le caractère juste fait aussi appel à des déterminations extérieures au ministre. Le droit objectif vient compléter ainsi les insuffisances du droit subjectif.

L'exposé se déroule selon le schéma suivant : « à la recherche du droit subjectif » (p. 9-23), « contextes » (p. 25-62) historiographique, théologique, textuel, « *potestas, executio potestatis* et conception du droit chez Gratien » (p. 63-106), « les critères d'analyse des sacrements chez les décrétistes » (p. 107-137), « le cas du sacrement de l'ordre » (p. 139-210), « les problématiques de l'ordination des moines, de l'ordination absolue et de l'ordination par un évêque non approprié » (p. 211-248), « le pouvoir de lier et de délier des prélats hérétiques » (p. 249-276) et les « conclusions » (p. 277-294).

L'auteur en déduit que la conception objective du droit n'est sans doute pas revendiquée comme telle par les auteurs étudiés ici (à savoir Gratien, Roland, Rufin, Étienne de Tournai, Jean de Faenza, Simon de Bisignano, Huguccio et les *Summæ parisiensis, coloniensis, lipsiensis*, etc.), et elle s'accommode aisément « d'un vocabulaire subjectivement façonné : *potestas, potentia, facultas, ius dandi, potentia dandi, ius exequendi*. Pourtant elle conditionne le processus de raisonnement. Elle est produite par des questions pratiques pour fournir des distinctions opérantes que le droit objectif ne pouvait engendrer. Elle comprend que l'effet des sacrements ne se produit que dans les situations dans lesquelles la célébration du sacrement devient l'objet juste de l'agir ministériel, tant la transmission de la grâce en l'absence de la justice, et nonobstant la possession de la *potestas ordinis*, semble inconcevable ».

La bibliographie des sources primaires éditées et des sources secondaires occupe les p. 295 à 322. Elle est suivie de divers index : *manuscriptorum, nominum et rerum*.

Dominique LE TOURNEAU

SPEDICATO, Emanuele, *Le Cause di canonizzazione alla luce del diritto processuale: Analisi testuale e contestuale del can. 1403*, Tesi Gregoriana, Serie Diritto Canonico 110, Rome, Pontificia Università Gregoriana, 2017, 312 p. — ISBN 978-88-7839-378-3 — € 28,00

The 1917 Code of Canon Law contained 143 canons (cann. 1999-2141) regulating the procedures in cases of the beatification and canonisation of the Servants of God, sandwiched in between matrimonial processes and the application of penal sanctions. In this, the law clearly was walking on the same path as in previous centuries, not only in reserving such cases to the Apostolic See, but also in treating them as judicial processes.

Of the canons on the procedures for beatification and canonisation in the prior Code, only a single one survived in the 1983 Code of Canon Law: “§1. Special pontifical law governs the causes of canonization of the servants of God. §2. The prescripts of this Code, however, apply to these causes whenever the special pontifical law refers to the universal law, or norms are involved which also affect these causes by the very nature of the matter” (can. 1403). It is perhaps not very surprising, given the comparatively rare use and limited applicability of these procedures when compared to, say, the procedures for the declaration of matrimonial nullity, that they have been removed from the Code, as was done with the regulations for the Roman Curia in Book II. The current law for causes of canonisation is found in the apostolic constitution *Divinus perfectionis magister* (John Paul II, 25 January 1983—the date of the promulgation of the 1983 Code of Canon Law—AAS 75 [1983] 347-355), the *Normae servandae* (Congregation for the Causes of the Saints, 20 August 1983, Ochoa, *Leges Ecclesiae* VI:8666-8668), and the instruction *Sanctorum Mater* (Congregation for the Causes of the Saints, 17 May 2007, AAS 99 [2007] 465-517): taken together, these present a complete, comprehensive, and relatively compact presentation of the processes, and, when taken with the other occasional norms, such as those for the diocesan process (7 February 1983), for medical examinations (2016), and for “the Administration of Temporal Goods in the Causes of Beatification and Canonization” (4 March 2016), one would have thought that everything that could be said, had been said. But they are all now outside of the Code.

It is more interesting to consider why the processes used for beatification and canonization are still formally *judicial* processes, and not administrative or some other procedures. The present work, the A.’s doctoral dissertation at the Gregorian University in Rome, seeks to place the investigation of the causes of beatification and canonisation within the context of Book VII of the 1983 Code of Canon Law. Starting with the significance of the fact that

the single canon in the 1983 Code dealing with these cases is placed, not in the section on the Apostolic See, or even in the section on certain special processes (Book VII, part III, parallel to where these canons were in the 1917 Code), but as one of the four introductory canons of Book VII (“On Trials in General”).

That seems, at first glance, to be quite strange. If the object of a trial is “the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts” (can. 1400 §1.1°-2° is obviously not relevant), what “rights” are being vindicated in a canonisation, or is a canonization simply declaring a “juridic fact”—and what is the juridic significance of a canonisation? To what extent is canonisation a “contentious” process? Beginning with an overview of the exercise of the *munus iudicandi* within the Code, the A. then presents an historical overview of the processes, concentrating on a systematic presentation of the norms in the 1917 Code.

The main section of the dissertation is found in the careful, even word-by-word, parsing of the deliberations of the *coetus de processibus* of the Code Revision Commission, and of the final product in can. 1403 in the current Code. He then evaluates both the analogies and the differences between the procedures for canonisations and other canonical procedures. The formulation of this canon represents, the A. contends, a compromise which is, at the same time, of great relevance and usefulness, as it has lightened (or perhaps unburdened) the general procedural law of a section containing many canons, while still making a substantial reference to them, whenever it necessary or possible *ex natura rei*. The work is really not a description of the canonisation process itself, but a more doctrinal presentation of how, and even why, canonization is a judicial process, and how it is similar and different from other procedures in the life of the Church, benefiting the *salus animarum*.

W. Becket SOULE

TIERNEY, Brian, *Liberty & Law: The Idea of a Permissive Natural Law, 1100-1800*, Studies in Medieval and Early Modern Law 12, Washington, The Catholic University of America Press, 2014, 380 p. — ISBN 978-0-8132-2581-4

Well known to canonists is the categorization of ecclesiastical laws as preceptive, prohibitive, or permissive, that is, laws which require, forbid, or allow something. This study looks at the third category, not of merely ecclesiastical laws, but of the permissive natural law.

This a very interesting and informative book written in a clear and accessible style by a well known medieval historian who has specialized in medieval canon law. The idea of permissive natural law was important in the writings of many canonists and others from the twelfth to the eighteenth centuries, after which it was largely forgotten. The permissive natural law is quite broad, including everything not positively required or prohibited. Thus, the concept is an affirmation of human freedom to choose among various options in all situations except when the law expressly prohibits it or requires something else.

The notion of permissive natural law was especially helpful in resolving apparent conflicts between the natural law and human law. For example, the private ownership of property and slavery, both commonplace in society and permitted by Church and civil laws, seemed contrary to the natural law which favoured the ideas that creation is the property of all and that human liberty is the natural state of all. In reply, jurists could argue that private property and slavery, even if not ideal, are legitimate because there is no divine law expressly prohibiting them, so they are not positively excluded. The idea of a permissive natural law was also invoked to argue that civil laws permitting usury were justifiable even though the practice was strongly condemned by the Church.

The canonical writings on permissive natural law treated in the work are chiefly those of Gratian and the Decretists, Johannes Andreae, and Francisco Suarez. The A. also discusses the thought of Catholic and Protestant theologians, philosophers, and secular jurists, chiefly Thomas Aquinas, William of Ockham, Marsilius of Padua, Richard Hooker, Hugo Grotius, John Selden, Samuel Pufendorf, and Immanuel Kant. In this reviewer's opinion, the idea of a permissive natural law would still be valuable today in the field of moral theology, at least for Catholic ethicists, since few others even accept the existence of a natural law. In any case, the value of this work does not depend on any practical application but stands on its own. It is a real intellectual gem and well worth the read.

John M. HUELS

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OUVRAGES REÇUS À LA RÉDACTION — BOOKS RECEIVED

BALAM, Mario Medina, *¿Pueden comulgar los divorciados vueltos a casar? Análisis de la norma canonica a la luz de Amoris Laetitia*, Mexico City, Buena Prensa, 2017, 82 p. — ISBN 978-607-8492-94-7 — MXN 55,00

BELEM, Pêgd-Wêndé Wenceslas, *Le principe de conciliation dans les causes matrimoniales. Étude du canon 1446*, Dissertationes canonicae 7, Madrid, Ediciones Universidad San Dámaso, 2017, xiv, 424 p. — ISBN 978-84-16639-59-5 — € 20,00

DEL POZZO, Masimo, *Lo stato giuridico fondamentale del fedele*, Subsidia canonica 23, Rome, Pontificia Università della Santa Croce, Facoltà di Diritto Canonico, 2018, 277 p. — ISBN 978-88-8333-732-1 — € 25,00

—, *I precetti generali della Chiesa*, Pontificia Università della Santa Croce, Monografie giuridiche 47, Milano, Giuffrè Francis Lefebvre, 2018, xvi, 294 p. — ISBN 978-88-288-0677-6 — € 32,00

DÍAZ MORENO, José, Umberto Mauro MARSICH, and Mario Medina BALAM, *Celebremos el sacramento del perdón. Pastoral. Derecho canónico. Teología moral*, Mexico City, Universidad Pontificia de México, 2018, 309 p. — ISBN 978-607-7837-32-9

FARIS, John D., *Canon Law and Ecumenism: What We Have To Be Is What We Are*, Dharmaram Canonical Studies 21, Bengaluru, India, Dharmaram Publications, 2018, x, 114 p. — ISBN 978-93-84964-09-2 — Rs. 250.00

FARNÓS, Jordi Bertomeu, *La participación de los laicos en el ejercicio de la cura pastoral parroquial: ¿Expresión de una nueva ministerialidad en la Iglesia? Estudio exegético del can. 517 §2 CIC*, Tesi Gregoriana Serie Diritto Canonico 111, Rome, Pontificia Università Gregoriana/Pontificio Istituto Biblico, 2017, 400 p. — ISBN 978-88-7839-379-0 — € 30,00

- GOŁĘBIEWSKI, Robert, *Il curator processuale nelle cause di nullità matrimoniale secondo la giurisprudenza rotale: Funzione e costituzione*, Tesi Gregoriana Serie Diritto Canonico 112, Rome, Pontificia Università Gregoriana/Pontificio Istituto Biblico, 2017, 301 p. — ISBN 978-88-7839-391-2 — € 28,00
- HILL, Mark and R. H. HELMHOLZ (eds.), *Great Christian Jurists in English History*, Cambridge Studies in Law and Christianity, Cambridge, Cambridge University Press, 2017, xxii, 353 p. — ISBN 978-1-107-19055-9 — CA\$ 45.95
- JEANTIN, Claude, *L'immatunité devant le droit matrimonial de l'Église*, Paris, Letouzey et Ané, 2018, 428 p. — ISBN 978-2-7063-0299-2 — € 55,00
- MARINS Y EQUIPO, José, *Pequeños pasos, largo camino: Las CEBs promoviendo un nuevo modelo de Iglesia*, Macao, China, Claretian Publications, 2018, xv, 348 p. — ISBN 978-99965-56-07-4
- MODRIĆ, Alan, *Interazione tra l'esercizio della potestà dei vescovi diocesani e di quella del Romano Pontefice alla luce dell'enciclica Ut unum sint*, Tesi Gregoriana Serie Diritto Canonico 10, Rome, Pontificia Università Gregoriana/Pontificio Istituto Biblico, 2017, 381 p. — ISBN 978-88-7839-368-4 — € 24,00
- NEDUNGATT, George, *Covenant Life, Law, and Ministry According to Aphrahat*, Kanonika 26, Rome, Edizioni Orientalia Christiana and Valore Italiano, 2018, 338 p. — ISBN 978-88-97789-30-7 — € 55,00
- NKOUAYA MBANDJI, Valère, S.J., *La prescription canonique de délits sexuels sur des personnes mineures*, Paris, Éditions Lethielleux, 2018, 360 p. — ISBN 978-2-249-62644-9 — € 20,00
- PAGLIALUNGA, Sara, *Il sanzionamento del sacerdote concubinario. Una norma a difesa dell'obbligo alla continenza (can. 1395 §1)*, Tesi Gregoriana Serie Diritto Canonico 109, Rome, Pontificia Università Gregoriana/Pontificio Istituto Biblico, 2017, 201 p. — ISBN 978-88-7839-376-9 — € 21,00
- SPEDICATO, Emanuele, *Le cause di canonizzazione alla luce del diritto processuale. Analisi testuale e contestuale del can. 1403*, Tesi Gregoriana Serie Diritto Canonico 110, Rome, Pontificia Università Gregoriana/Pontificio Istituto Biblico, 2017, 312 p. — ISBN 978-88-7839-378-3 — € 28,00

TAMMLER, Ulrich, *Albert Michael Koeniger (1874-1950). Aus dem Leben und Wirken eines schwäbisch-bayerischen Kanonisten und Kirchen-(rechts)historikers*, Kanonistische Abteilung, Band 74, Sankt Ottilien, EOS Verlag, 2018, lii, 374 p. — ISBN 978-3-8306-7899-1 — € 49,95

TIERNEY, Brian, *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800*, Studies in Medieval and Early Modern Canon Law 12, Washington, D.C., The Catholic University of America Press, 2014, xii, 380 p. — ISBN 978-0-8132-25810-4 — \$ 39.95

NOTES BIOGRAPHIQUES BIOGRAPHICAL NOTES

Bosso, Armand Paul-Joseph

Le Père Armand Paul-Joseph Bosso est né à Grand-Bassam en Côte d'Ivoire, le 16 mars 1981. Après son parcours primaire, il entre successivement au Petit puis au Moyen séminaire, où il suit la formation classique jusqu'en classe de Terminale littéraire. À l'âge de 18 ans, il est admis au Grand séminaire interdiocésain d'Anyama. Au terme de sept années de formation, il est ordonné diacre en juillet 2005, puis prêtre le 23 avril 2006, pour le compte du Diocèse de Grand-Bassam. Après deux années d'activités pastorales en milieu rural, il s'initie à des études de droit canonique au cours de l'année académique 2008-2009, à l'Université Catholique de l'Afrique de l'Ouest, Unité de l'Université de Cocody d'Abidjan en Côte d'Ivoire, d'où il en ressort en 2011 avec la licence canonique. De retour dans son diocèse d'origine, il assume successivement la responsabilité de recteur d'un centre de spiritualité, puis de secrétaire de son évêque. À partir de l'année 2013, il est admis à l'Université Pontificale Urbanienne, pour y poursuivre ses études de droit canonique. Le 14 décembre 2016, il obtient le doctorat dans ladite discipline, puis un master en jurisprudence et praxie ecclésiastique en juin 2017. Depuis septembre 2017, il exerce en tant qu'enseignant auprès de la Faculté de Droit Canonique de l'Université Pontificale Urbanienne et parallèlement il intègre l'équipe des formateurs du Grand Séminaire de la Propagande Fide à Rome.

BROWN, Phillip J., P.S.S.

The Very Reverend Father Phillip Brown, a priest of the Diocese of Bismarck, is a member of the Society of St. Sulpice since 2004. Born in Bismarck, ND, he holds a bachelor's degree in Music from the University of Michigan, a civil law degree from the University of North Dakota, S.T.B. from the Catholic University of America, and J.C.L. and J.C.D from the Pontifical Gregorian University in Rome where his doctorate was awarded *summa cum laude* for his dissertation *Canon 17 CIC 1983 and the Hermeneutical Principles of Bernard Lonergan*. He served as parochial vicar, pastor

and high school chaplain in the Diocese of Bismarck between 1989 and 2001, where he was also Chair of the Priests' Personnel Board, member of the board of the Priest's Benefit Association, and member of the Holiness of Human Life Committee of the North Dakota Catholic Conference. He also served on the board of the Bismarck Early Childhood Development program and several domestic violence assistance programs. He was appointed a member of the ND Governor's Task Force for the Revision of the North Dakota Juvenile Court Act. He also served on the boards of Bishop Ryan High School (Minot, ND) and Trinity High School (Dickinson, ND). He was a judge of diocesan tribunal Bismarck Tribunal and briefly its Adjutant Judicial Vicar. He served on the faculty of St. Mary's Seminary & University, Baltimore, MD, where was Dean of the School of Theology from 2004-2006, and Associate Professor of Canon Law. He was Assistant Professor of Canon Law at the Catholic University of America School of Canon Law from 2006 to 2010. He served as Chair of the CLSA Committee on Canon and Civil Law from 2004-2009, and was a member of the CLSA Board of Governors from 2007-2010, serving as Senior Consultor, a member of the Resource and Asset Management Committee and Chair of Committee on Professional Responsibility. He was the president of the CLSA in 2013-2014. He was General Treasurer of the Society of St. Sulpice 2008-2016 and Rector of Theological College (Washington, D.C.) 2011-2016. Since 2016, he has been president of Saint Mary's Seminary and University (Baltimore, MD). He is a member of the bar of the United States Supreme Court, U.S. Eight Circuit Court of Appeals, North Dakota Supreme Court and New York City Bar Association, the United States Supreme Court Historical Society and member of the Board of Trustees of the Maryland St. Thomas More Society.

CAMIRAND, Daniel

Daniel Camirand est diplômé en droit (LL. B., Université de Montréal), en théologie (M. Th., Université de Montréal) et en droit canonique (M.D.C., Université d'Ottawa et Université Saint-Paul et J.C.L., Université Saint-Paul). Après avoir été animateur de pastorale et responsable de confessionnalité scolaire pour la Commission scolaire de Saint-Hyacinthe (Québec, Canada), il y occupe maintenant les postes de directeur général adjoint et de secrétaire général. Il est aussi conférencier et formateur en matière d'éthique en milieu scolaire.

CHARBONNEAU, Louise, sco

Sœur Louise Charbonneau est née à Ottawa le 23 septembre 1949. Elle obtient le degré B. Sc. N. de l'Université d'Ottawa en 1976, la M. Sc. (A)

en Nursing de l'Université McGill en 1984 et les degrés B. Th. en 2007 et JCL en 2018 de l'Université Saint-Paul. Elle entre dans la Congrégation des Sœurs de la Charité d'Ottawa en 1999 et fait profession en 2000. Elle a fait carrière en tant qu'infirmière psychiatrique soit comme laïc ou comme religieuse, dans le domaine des soins de santé séculiers et catholiques durant trente-huit ans. Elle a occupé des postes cliniques, éducatifs et administratifs. Elle a aussi coordonné des services religieux et bénévoles en pastoral et en soins palliatifs, toujours dans la région d'Ottawa, Ontario. Elle est actuellement Administratrice du Centre de services canoniques, Faculté de Droit canonique, Université Saint-Paul, Ottawa.

DANIEL, William L.

William L. Daniel is an Assistant Professor in the School of Canon Law at The Catholic University of America in Washington, D.C., U.S.A., where he has taught since 2015. He originates from Madison, Wisconsin, and studied canon law at Saint Paul University in Ottawa, where he earned the J.C.L./M.C.L. in 2006 and the J.C.D./Ph.D. in 2015. Prior to his current position, he was the vice-chancellor and a judge in the Diocese of Winona, and he still serves as defender of the bond for the Diocese of Madison. He has published numerous articles in various canon law journals, especially in the area of procedural law. He is the compiler and translator of "*Ministerium Iustitiae.*" *Jurisprudence of the Supreme Tribunal of the Apostolic Signatura. Official Latin with English Translation* (Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2011). He and his wife have been married since 2004 and have been blessed with six children.

GLENDINNING, Chad J.

Dr. Chad J. Glendinning is an associate professor, secretary, and director of graduate studies for the Faculty of Canon Law at Saint Paul University in Ottawa, where he has taught since 2010. His university degrees include a B.A. in Philosophy (2001) from King's University College — Western University, London, ON; B.Th. (2005), J.C.L. (2008) and J.C.D. (2010) from Saint Paul University, Ottawa, ON; M.C.L. (2007) and Ph.D. (2010) from the University of Ottawa. He is a consultant on the Board of Governors of the Canon Law Society of America, and the Anglophone Consultant of the Executive Board of the Canadian Canon Law Society.

HUELS, John M.

John M. Huels was born in St. Louis, Missouri on 13 November 1950. His studies include: St. Louis University (B.A., [Psychology and Philosophy],

1971); Catholic Theological Union, Chicago, IL (M.A. [Theology], 1976; M.Div., 1976); The Catholic University of America, Washington, DC (J.C.D., 1982). He has been assistant professor (1982-1988) and associate professor of canon law (1988-1997), Catholic Theological Union, Chicago; judge, Provincial Appeals Court, Province of Chicago, 1986-1995; associate professor, Faculty of Canon Law, Saint Paul University, Ottawa, ON (1997-2000), full professor (2000-2018); President, Professors' Association of Saint Paul University (2008-2012, 2015-2018).

JAKUBIAK, Tomasz

Father Tomasz Jakubiak was born in Warsaw, Poland in 1976, and was ordained to the priesthood in 2001 in the Archdiocese of Warsaw. Having graduated from Klementyna Hoffmanowa High School in Warsaw in 1995, he joined St. John the Baptist Higher Metropolitan Seminary in Warsaw and began studies in theology at the Pontifical Faculty of Theology in Warsaw (PWTW), John the Baptist Section. He received the M.Div., 2000 and B.Div., 2003, Pontifical Faculty of Theology in Warsaw; J.C.L., 2008 and J.C.D./Ph.D., 2010, Cardinal Stefan Wyszyński University, Faculty of Canon Law (Poland). He served as a clerk at the Warsaw Metropolitan Curia, Department of Sacramental Affairs (2006-2007); notary of the Warsaw Metropolitan Curia (2007-2010); and judge of the Metropolitan Episcopal Court in Warsaw (2010-2012). He currently works as Assistant Professor at PWTW Collegium Joanneum and lecturer in canon law at the Metropolitan Higher Seminary in Warsaw. In 2018, he received the title of Doctor Habilitatus of Canon Law. His record includes: 31 academic articles and a book entitled *Problem ważności przyjęcia sakramentu święceń w prawie Kościoła katolickiego (The Problem of the Validity of Receiving the Sacrament of Holy Orders in the Law of the Catholic Church)*, Płocki Instytut Wydawniczy, Płock 2018.

KALETA, Paweł

Father Paweł Kaleta is born in Radom, Poland, on 17 May 1971 and ordained to the priesthood on 29 May 2004. He holds a M.A. in Theology (Cardinal Stefan Wyszyński University in Warsaw, 2004); M.A. in Canon Law, and a JCD (John Paul II Catholic University of Lublin, 2011). He completed his postdoctoral studies in canon law at the Cardinal Stefan Wyszyński University in Warsaw in 2018. He specializes in ecclesiastical patrimonial law. From 2011, he has been working as a researcher at John Paul II Catholic University of Lublin. He is a member of the Polish Canonists' Society and of the Canon Law Society of Great Britain & Ireland. He has published a number of works, mostly centered on matters relating to

temporal goods and patrimonial legislation. He has received two research grants financed by the National Science Centre, Poland.

MADDINENI, Sarath, C.Ss.R.

Father Sarath Maddineni was born in Nagrjunasagar, India on 5 January 1977. A member of the Congregation of the Most Holy Redeemer (Redemptorists) since 2000, he was ordained to the priesthood in 2005. He was awarded the degrees of Bachelor of Arts (Bangalore University, 1999), Bachelor in Theology (St. Peter's Pontifical Institute, Bangalore, India, 2004), Licentiate in Canon Law (Saint Paul University, Ottawa, 2016), Master in Canon Law (University of Ottawa, 2016), and Doctor of Canon Law (J.C.D., Saint Paul University, 2018; Ph.D., University of Ottawa, 2018). Currently he serves as Defender of the Bond for the Eparchy of Saint Sauveur of the Montreal Tribunal for the Greek Melkite Catholics in Canada, Collegial Judge for the Archdiocese of Toronto, and associate pastor of St. Patrick Church in Toronto

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Father Francis G. Morrisey was born in Charlottetown, PEI, Canada, on 13 February 1936, and ordained to the priesthood on 23 September 1961. He completed his studies at the University of Ottawa and at Saint Paul University. He has occupied many administrative positions at Saint Paul University, including Dean of the Faculty of Canon Law, 1972-1984. He also served as consultor for the Pontifical Council for the Interpretation of Legislative Texts, the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, and the Canadian Conference of Catholic Bishops, Canon Law and Inter-Rite Commission. Adviser to numerous religious institutes for the preparation of proper law and for the reorganization of their various apostolic ministries. Member of the Canon Law Committee, Catholic Health Association of the USA; canonical consultant to numerous healthcare systems in Canada, the USA, Ireland, and Australia. Presently, he is Professor emeritus in the Faculty of Canon Law of Saint Paul University.

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Monsignor John A. Renken, P.H., was born in Carlinville, Illinois on 18 January 1953. He holds a B.A. in Philosophy (Cardinal Glennon College, Saint Louis, 1975); M.A. in Civil Law (University of Illinois, Springfield, 1988); S.T.D. in Dogmatic Theology (Pontifical University of Saint Thomas Aquinas, Rome) and J.C.D. (Pontifical University of Saint Thomas Aquinas, Rome, 1981). He was ordained a priest by Saint John Paul II on 24 June 1979.

He served in multiple positions in the Diocese of Springfield in Illinois: parochial vicar, chaplain, co-pastor, priest-moderator, vice-chancellor, chancellor, episcopal vicar and moderator for canonical affairs, vicar general, moderator of the curia, judicial vicar, first director of the permanent diaconate. He was president of the CLSA (1999-2000); chair of the committee for the 1999 CLSA translation of the CIC; advisor to the USCCB Committee on Canonical Affairs (2003-2005); visiting professor of canon law in the summer JCL program at The Catholic University of America (1989-2006). He has lectured widely and his articles appear in many canonical journals. In 2007, he joined the Faculty of Canon Law, Saint Paul University, Ottawa, where he is now Dean and full professor.